(1)

991843 FEB 8 2000

No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD C. MOENNING,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR A WRIT OF CERTIORARI

RICHARD C. MOENNING
Counsel of Record

OFFICES OF RICHARD C. MOENNING-LAWYER
135 S. LaSalle Street
Chicago, Illinois 60603

312-263-0062

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

44PP

QUESTION PRESENTED

Whether the final decision of the Illinois Commerce Commission which dismissed petitioner's complaint as a matter of law and with prejudice over petitioner's objection that it lacked such statutory jurisdiction and was required to conduct an evidentiary hearing and to determine facts, may be reviewed pursuant to 28 U.S.C. Section 1257, as repugnant to the Fourteenth Amendment of the federal Constitution that guarantees due process where, the Illinois Commerce Commission and the regulated public utility further combine to assert the Illinois Appellate Court has no subject matter jurisdiction to review its final decision.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

I. The Commerce Commission's Final Decision Exceeds Its Statutory Authority And Violates The Fourteenth Amendment 4

II. The Right To Appeal An Agency Decision Belongs To The Judiciary 7

III. The Result In The Lower Court Is So Clearly Erroneous An Appropriate Order Of Reversal Is Needed To Vindicate Federal Supremacy Of The Fourteenth Amendment 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Business and Professional People For the Public Interest v. The Illinois Commerce Commission, 136 Ill. 2d 192, 555 N.E.2d 693 (1990) 5, 9

Business and Professional People For the Public Interest v. The Illinois Commerce Commission, 146 Ill. 2d 175, 585 N.E.2d 1032 (1991) 5, 9

City of Chicago v. Fair Employment Practices Commission, 65 Ill. 2d 108, 357 N.E.2d 1154 (1976) 5

County of Cook, Cermak Health Services v. Illinois State Local Labor Relations Board, 144 Ill. 2d 326, 579 N.E.2d 866 (1991) 8

Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) 4, 5

Lawrence v. Chater, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) 10

Newkirk v. Bigard, 109 Ill. 2d 28, 485 N.E.2d 321 (1985) 5

O'Connell v. St. Francis Hospital, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986) 8

People of the State of New York ex rel. New York & Queens Gas Company v. McCall, 245 U.S. 345, 62 L.Ed. 337 (1917) 6

STATUTES AND RULES:

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2106 ..... 6, 9, 11

83 Illinois Administrative Code CH. III, Section 200.500(d) 5

TABLE OF AUTHORITIES – Continued

Page

Public Utility Act Section 10-201 (220 ILCS 5/10-201) 1, 7

Administrative Review Act (735 ILCS 5/3-113) 2, 7

Supreme Court of Illinios, Rule 335 ..... 3, 8, 9, 10

Supreme Court of Illinois, Rule 303(d) 2, 10

MISCELLANEOUS:

Formal Complaint (Docket No. 97-0528) (Appendix 1-11) 1

PETITION FOR A WRIT OF CERTIORARI

Richard C. Moenning respectfully petitions for a writ of certiorari to the Supreme Court of Illinois to review the judgment of the Illinois Commerce Commission, served September 25, 1998, in Docket No. 97-0528.

OPINIONS BELOW

Judicial review was denied by the Supreme Court of Illinois (185 Ill. 2d 631), and by the Illinois Appellate Court, First District. There are no reported opinions.

JURISDICTION

The Supreme Court of Illinois denied Leave to Appeal As A Matter of Right (Docket No. 87680), October 6, 1999, and, denied Petitioner's Motion for Leave to file a Motion for Reconsideration of the order denying petition for leave to appeal, November 16, 1999. Justice John Paul Stevens granted petitioner's Application for Extension of Time, January 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 10-201 of the Public Utility Act (220 ILCS 5/10-201) provides for judicial review of Illinois Commerce Commission decisions to the Illinois Appellate Court. Illinois Constitution, Article 6, Section 6, grants the Illinois Appellate Court such powers of direct review

of administrative action as provided by law (735 ILCS 5/3-113); and Rule 335 of the Supreme Court of Illinois directs the procedure for a statutory direct review of orders of an administrative agency by the Appellate Court, including Rule 303(d).

STATEMENT

Without a hearing, or other due process of law, Commonwealth Edison, a regulated public utility (respondent Edison), imposed a $150.00 penalty for continued electrical service to petitioner. Petitioner, an established customer from 1971, complained to the Illinois Commerce Commission (respondent Commission) which advised respondent Edison had the right to impose its penalty.

Petitioner filed a formal complaint with respondent Commission (Docket No. 97-0528). Respondent Edison objected to the complaint and moved to dismiss as a matter of law with prejudice. Over petitioner's objections to the Commission of the Hearing Examiner's *ex parte* communications, denial of discovery, the refusal to conduct an evidentiary hearing, the disregarding of an offer of proof, the Hearing Examiner's proposed recommended action in violation of federal and state constitutional due process, and marking the case "Heard and Taken", the complaint was dismissed. The Commission found "no compelling evidence presented . . . and . . . the allegations and arguments presented by Complainant in both his Response to the Motion to Dismiss as well as his Brief on Exceptions amount to groundless assertions, . . . clearly

without merit, and must be rejected."[1] The Commission summarily denied petitioner's statutory verified application For Reconsideration, served November 20, 1998, as raising nothing further. (App. 9)

Petitioner filed a Notice of Appeal with respondent Commission's Clerk, December 18, 1998, who docketed the appeal, December 22, 1998. The clerk returned a copy of the Notice of Appeal, December 22, 1998; and, on receipt of a copy of the Notice of Appeal filed stamped December 18, 1998, on December 24, 1998, petitioner filed the copy of the Notice of Appeal with the Clerk of the Illinois Appellate Court.[2] The Clerk of the Illinois Appellate Court never docketed the appeal, until January 27, 1999, and only after petitioner timely filed a Petition For Review upon leave of Court under Rule 335, as extended by Rule 303(d).

Respondent Edison moved to dismiss the appeal contending (1) an untimely Notice of Appeal in the Appellate Court, (2) failure to name a necessary party in the untimely Notice of Appeal and (3) an untimely Petition For Review filed with the Appellate Court. Over petitioner's objections, the appeal was dismissed March 29, 1999, without vacating the prior order of January 27, 1999. Petitioner filed a Petition For Rehearing, April 19, 1999, which the Appellate Court denied May 8, 1999.

---

[1] Commission Decision, page 4, served September 25, 1998, disposing of all state and federal constitutional objections. (App. 6-7)

[2] There is no evidence of this Notice of Appeal in the Record, only the time stamped Notice of Filing.

Petitioner sought relief in the Supreme Court of Illinois, through issuance of a Supervisory Order, denied June 30, 1999, and on a Petition For Leave to Appeal as of Right, denied October 6, 1999. Petitioner's Motion For Leave to File a Motion For Reconsideration of the denial of Leave to Appeal was denied November 16, 1999. Petitioner has exhausted all recourse to an evidentiary hearing.

REASONS FOR GRANTING THE PETITION

I

THE COMMERCE COMMISSION'S FINAL DECISION EXCEEDS ITS STATUTORY AUTHORITY AND VIOLATES THE FOURTEENTH AMENDMENT.

Petitioner seeks recourse to this Court to redress the respondent Commerce Commission's violation of his Fourteenth Amendment right to due process. 28 U.S.C. § 1257(a). *Howlett v. Rose*, 496 U.S. 356, 366, 110 S.Ct. 2430, 110 L.Ed.2d 332, 347 (1990) is authority that recourse to this Court is proper and appropriate.

> "Whether the constitutional rights asserted by petitioner were 'given due recognition by the [Court of Appeal] is a question as to which the [petitioner is] entitled to invoke our judgment, and this [he has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.' "

Petitioner, like the former student, raised his constitutional claim to due process in his complaint to the Commission. (App. 27) The regulated public utility moved the Commerce Commission without citation to statutory authority to dismiss the complaint. Without taking evidence and often referring to other challenges *de hors* the record, at least 15 years earlier, contrary to Commission's hearing procedure, 83 Illinois Administrative Code CH. III, Section 200.500(d), the complaint was dismissed as a matter of law and with prejudice.

The Illinois Supreme Court decided in *Business and Professional People For the Public Interest v. The Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E.2d 693 (1990) and 146 Ill. 2d 175, 195, 585 N.E.2d 1032 (1991) the Commerce Commission is different from a court and has no authority to make decisions except as authorized by legislation. (136 Ill. 2d at 243) Nonetheless, the Commission empowered itself in express terms to dismiss petitioner's complaint as a matter of law thereby taking no evidence to analyze and hear petitioner's federal right to due process. It elected in express terms to make its final decision without an evidentiary hearing to receive evidence, even though absent such authorization, the commission exceeded its jurisdiction with a void order. See also *City of Chicago v. Fair Employment Practices Commission*, 65 Ill. 2d 108, 112-13, 357 N.E.2d 1154 (1976) and *Newkirk v. Bigard*, 109 Ill. 2d 28, 36, 485 N.E.2d 321 (1985).

The granting of certiorari is appropriate and proper since there is no danger this Court would substitute its judgment for that of this administrative agency. The record before the Commission is not long nor filled with complex facts, wisdom, or policy. There is no evidence to

analyze or balance. (App. 27) In *People of the State of New York ex rel. New York & Queens Gas Company v. McCall*, 245 U.S. 345, 62 L.Ed. 337 (1917), this Court citing the same principle as above:

> "It is the result of these and similar decisions, that while in such cases as we have here this court is confined to the Federal question involved, and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at; yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the Federal constitutional right claimed has been denied; *as, in this case, whether there was such a want of hearing or such arbitrary or capricious actions on the part of the Commission as to violate the due process clause of the Constitution.*" (Emphasis added)

The principle presented in this petition is important and there is no judicial review available to petitioner to redress the denial. As a result of the difficulty of securing judicial review, this case presents this Court with the opportunity to vindicate petitioner's Fourteenth Amendment right to due process requiring state administrative agencies to recognize and give substance to the supremacy of federal constitutional principles in making factual decisions. 21 U.S.C. § 2106.

II

THE RIGHT TO APPEAL AN AGENCY DECISION BELONGS TO THE JUDICIARY

Persons and businesses in the United States are subject to myriad rules and regulations that are derived from authority of Congress and the legislatures of the fifty states. The importance of certiorari in this case is the federal question it raises; yet, also the case presents the perplexing question whether the agency itself ought to control the process of judicial review. The issue is particularly sensitive and important to good government where as here the regulated public utility deprives petitioner of his claim to constitutional due process and the respondent Edison, the regulated public utility, moved to dismiss review of the decision in the judiciary – the Illinois Appellate Court.[3]

Petitioner sought review of respondent Commerce Commission's final decision according to the statutes that authorize the Commission including reference to an appeal process. 220 ILCS 5/10-201 (App. 20-22) See also, 735 ILCS 5/3-113 (App. 22-23) The appeal remained undocketed even after the filing of the timely Notice of Appeal. As the time for appeal expired without the appellate court docketing the appeal, Petitioner, on motion authorizing an extension of time provided by Illinois

---

[3] It was respondent Edison that moved the respondent Commission to exceed its jurisdiction and to dismiss petitioner's complaint as a matter of law and with prejudice, citing no requisite statutory authority, and repeatedly referring to previous dockets, and appellate decisions interpreting an altogether different statute.

Supreme Court Rule 303(d), commenced judicial review pursuant to a concurrent procedure provided by Illinois Supreme Court Rule 335. (App. 23-24) In *County of Cook, Cermak Health Services v. Illinois State Local Labor Relations Board*, 144 Ill. 2d 326, 334, 579 N.E.2d 866 (1991), the Court acknowledged concurrent constitutional authority to promulgate procedural rules concerning direct appellate court review of administrative decisions citing *O'Connell v. St. Francis Hospital*, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

Without waiting for the respondent Commission, respondent Edison moved to dismiss petitioner's right of review in the Appellate Court claiming the Appellate Court lacked subject matter jurisdiction. But see Appendix 21-22, reciting extensive subject matter jurisdiction. The Appellate Court had docketed the appeal pursuant to Supreme Court Rule 335; and, without vacating its order docketing the appeal, the Appellate Court allowed respondent Edison's motion to dismiss publishing no opinion.[4]

Petitioner comes to this Court as the ultimate defender of Constitutional rights to due process. Here respondents combined at every opportunity to deny petitioner a hearing and vindication of his Fourteenth Amendment right to due process of law.

There is no record to explain the basis of the Appellate Court's reasoning for dismissing the appeal it had

---

[4] The irony of the result is that the respondent Commission which exceeds its jurisdiction claims the judiciary lacks subject matter jurisdiction and is able to abort the very constitutional protections which persons and businesses rely on to live with agency government.

just authorized; nor, is there any reason the Supreme Court of Illinois has failed to address the unconstitutional decision of respondent Commerce Commission. See *Business and Professional People For the Public Interest v. The Illinois Commerce Commission,* 136 Ill. 2d 243, 555 N.E.2d 693 (1990) and 146 Ill. 2d 175, 585 N.E.2d 1032 (1991).

The record in this case provides no explanation or reasoning. It is certain nonetheless the power to act is present and evidence. The failure to act to defend the judiciary's traditional role as guardian of individual liberty and constitutional rights from agency encroachment remains an enigma wrapped in a mystery.

The Court should grant certiorari to the Illinois Supreme Court to vacate the orders of the Appellate Court dismissing petitioner's appeal and requiring that Court to proceed to hear petitioner's appeal, and on finding no evidentiary record to vacate and remand the case to the Commerce Commission with directions to conduct a hearing and to find facts pertaining to petitioner's complaint. This Court has the requisite authority pursuant to 28 U.S.C. § 2106 to require a result that is just under the circumstances.

III

THE RESULT IN THE LOWER COURT IS SO CLEARLY ERRONEOUS AN APPROPRIATE ORDER OF REVERSAL IS NEEDED TO VINDICATE FEDERAL SUPREMACY OF THE FOURTEENTH AMENDMENT.

As a result of the Illinois Appellate Court order dismissing petitioner's timely appeal filed in accord with Supreme Court Rule 335, and the subsequent denials of

supervision or other judicial review, the certiorari papers present a simple, uncomplicated record of an agency decision beyond the scope of its jurisdiction. It also shows an agency and its regulated utility combining to avoid a merits disposition by the judiciary.

On the record presented by petitioner's certiorari papers an appropriate vindication of the Fourteenth Amendment right to due process is Rule 16.1 – summary disposition on the merits. Respondent Commerce Commission's final order is plainly beyond its jurisdiction and in violation of its legislative authority.

Respondent Edison in its Motion to Dismiss petitioner's appeal in the Appellate Court fails to mention Supreme Court Rule 303(d) extending the time to file a Petition For Review provided by Rule 335. On the record, the Appellate Court merely allows the respondent Edison's motion without vacating its prior order finding the appeal jurisdictional.

Since vindication of petitioner's Fourteenth Amendment right to due process requires judicial intervention and this Court is the ultimate authority of the supremacy and importance of the principals that administrative agencies shall abide persons whose lives and businesses are impacted by their decisions with constitutional protection of those rights, a simple order of summary reversal directing the decision of the respondent Commission be vacated as a violation of the Fourteenth Amendment to the federal Constitution is appropriate. It likewise is within the best tradition of this Court and its administration of its docket. See *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996).

This Court should grant petitioner's prayer for certiorari and on the record in this case enter an appropriate order. 28 U.S.C. § 2106.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD C. MOENNING,
Counsel of Record

OFFICES OF RICHARD C. MOENNING-
LAWYER
135 S. LaSalle Street
Chicago, Illinois 60603
312-263-0062

JUDGMENT SOUGHT TO BE REVIEWED

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Richard Moenning	:	
-vs-	:	**97-0528**
Commonwealth Edison Company	:	
Complaint as to billing in Evanston, Illinois.	:	

ORDER

By the Commission:

On October 17, 1997, Richard Moenning ("Complainant") filed his verified complaint with the Illinois Commerce Commission ("Commission") against Commonwealth Edison Company ("ComEd" or "Respondent") regarding billing to his residence in Evanston, Illinois.

Pursuant to notice as required by the law and the rules and regulations of the Commission this matter came on for hearing before a duly authorized Hearing Examiner at the Commission at its offices in Chicago, Illinois on various dates from November 13, 1997 through July 16, 1998, at which time the record was marked "Heard and Taken."

On March 23, 1997, ComEd filed a Motion to Dismiss. The Hearing Examiners set a briefing schedule providing for Complainant's Response and Respondent's Reply. A copy of the Hearing Examiners' Proposed Order was duly served on the parties. Complainant filed a Brief on Exceptions and ComEd filed a Reply Brief on Exceptions. The

arguments set forth in those pleadings are considered herein.

In his complaint, Complainant alleges that 83 Ill. Adm. Code Parts 280.50, 280.60 and 280.70 regarding security deposits are unlawful. He further contends that the practices of ComEd relating to security deposits are unconstitutional. He asserts that these practices and procedures deprive him and other utility customers of their property interests without due process of law. He contends that these provisions result in systematic and discriminatory classifications involving customers of ComEd. He also asserts that ComEd treats certain records as "confidential" and have refused him access to such records.

ComEd's Motion to Dismiss

In support of its Motion to Dismiss, ComEd sets forth the following arguments: (1) Complainant has failed to raise any contested factual issue; (2) Complainant's challenges to the regulations governing deposits have been fully litigated in previous dockets filed by Complainant at the Commission; and, (3) Complainant's confidentiality claim is without merit. For these reasons, Respondent asserts the complaint should be dismissed.

ComEd states that on July 11, 1997, Complainant's electric service was disconnected, pursuant to 83 Ill. Adm. Code Section 280.130, because Complainant failed to pay the amount due on his account. That same day Complainant paid the amount owed, and his service was reconnected. In accordance with Parts 280.60(e) and 280.70, Complainant was required to pay a security

deposit for continued service. ComEd asserts that the instant complaint does not allege that Complainant's service was discontinued in error. Nor does the complaint allege that such discontinuance violated the Act or any Commission regulation. Respondent further refutes Complainant's confidentiality claim as devoid of any legal basis upon which relief can be granted.

Furthermore, in response to Complainant's claims that the Commission's regulations governing deposits are unconstitutional, ComEd states that Complainant has previously filed two substantially similar complaints, one against ComEd and, the other against Illinois Bell Telephone. (See Orders in Dockets 81-0382, Order dated July 7, 1983 and Docket 83-0475, Order dated November 20, 1984). Respondent posits that in these two cases, the Commission upheld a utility's right to require deposits when a customer's service has been discontinued for non-payment. Moreover, in *Moenning vs. Illinois Bell Telephone Co.*, 139 Ill. App. 3d 521, 487 N.E. 2d 980 (1985), the Illinois Appellate Court upheld the Commission's finding that the security deposit requirement and termination of service did not give rise to a civil rights violation nor did they constitute a due process violation. ComEd asserts that since the Commission and the Illinois Appellate Court have already upheld the Commission's requirements regarding deposits, in particular as they apply to this Complainant, its Motion should be granted.

Complainant's Response to Motion to Dismiss

Mr. Moenning states that ComEd's Motion to Dismiss is defective. He asserts that the Commission is without

authority to grant the requested relief. Complainant cites to Sections 220.500(d) and 220.820 to support his contention that the Commission's rules limit the Commission's authority to dismiss his complaint. He maintains that these provisions contains no authority which allows the Commission to rule on Edison's Motion to Dismiss. Specifically, Complainant argues that the Commission has no authority granted it by the Legislature nor the Administrative Procedure Act to grant the requested relief.

Complainant asserts that the rules and regulations require that the Hearing Examiner only make a recommended or proposed Order after the close of evidentiary hearings. He contends that there has been no evidentiary hearing and that Edison's Motion to Dismiss seeks to avoid an evidentiary hearing. Complaint argues that the Supreme Court has ruled that the Commission is not a court nor does it have the power of a court. For these reasons, Complainant avers that the Commission must deny Edison's Motion to Dismiss.

ComEd's Reply

Respondent filed a Reply Memorandum in response to the assertions of Complainant. Respondent argues that Complainant is mistaken that the Commission does not have authority to grant ComEd's Motion to Dismiss. The Company argues that it properly brought its motion as explicitly authorized under Section 200.190(a) of the Commission Rules of Practice. ComEd asserts that its motion is proper and the complainant should be dismissed. Moreover, Respondent maintains that Complainant completely ignores Section 200.190(f), which further

demonstrates that the Commission has the authority to enter an Order granting a Motion to Dismiss.

ComEd also refutes Complainant's contention that Section 200.550(d) and 200.820 of the Commission's rules somehow limit the Commission's authority to dismiss the Complaint. The Company maintains that these sections are inapplicable to the instant situation.

Furthermore, ComEd cites *Chesterfield-Medora Telephone vs. Illinois Commerce Commission*, 37 Ill.2d 324, 328, 226 N.E. 2d 855,858 (1967), in support of its assertion that the Commission is not required to hold evidentiary hearings upon the filing of complaint. Thus, in this instance, where Complainant has failed to state a cognizable claim in his complaint, evidentiary hearings are neither required nor appropriate. Respondent maintains that the Commission may properly dismiss this matter for want of jurisdiction.

Additionally, ComEd takes issue with Complainant's allegation that ComEd violated Section 280.160 by claiming that its records are confidential. Respondent states that neither Section 280.160 nor any other Commission Rule or applicable statute requires ComEd to give Complainant unfettered access to its business records. Moreover, in response to Complainant's discovery requests, ComEd states that it has provided Complainant every relevant business record that he sought relating to the discontinuance in question in this proceeding.

Respondent further responds to Complainant's suggestion that ComEd is attempting to shift the burden of proof to the Complainant. ComEd maintains that it is well established that the burden of proof in a complaint

case is on the Complainant. *Antioch Milling Co. v. Public Service Co. of Northern Ill.*, 4 Ill. 2d 200, 209, 123 N.E. 2d 302, 307 (1954). Respondent argues that Complainant has failed to allege any statute, rule or regulation that ComEd has violated, and has therefore, failed to sustain his burden.

In sum, for the aforementioned reasons ComEd requests that the Commission grant its Motion to Dismiss the instant complaint and enter an order dismissing the complaint with prejudice.

Commission Analysis and Conclusion

The record in this matter shows that Complainant's electric service was disconnected for non-payment of his bill. In accordance with Sections 280.50 and 280.70, ComEd required Complainant to pay a deposit to have his service reconnected. This evidence is uncontroverted and we find that Respondent's request for a deposit was proper and conformed to the law and the rules and regulations of the Commission. We further conclude that there are no outstanding issues of fact regarding the instant complaint.

The Commission is mindful that Complainant has filed several complaints before the Commission in the past. We find that the Orders entered in those dockets, involve a thorough review of the same allegations and issues challenging the regulations governing deposits presented as in the instant complaint. We find no compelling evidence presented in this complaint that would cause us to revisit those issues. We are of the opinion that the allegations and arguments presented by Complainant

in both his Response to the Motion to Dismiss as well as his Brief on Exceptions amount to groundless assertions, are clearly without merit, and must be rejected.

Moreover, we find the arguments advanced by the Company compelling. Complainant has clearly not presented a cognizable complaint as required by 83 Ill. Adm. Code Section 200.170(c). As such, we find Respondent's Motion to Dismiss proper and in accordance with Section 200.190 (a). We are of the opinion that there remain no outstanding issues of fact or law regarding the instant complaint. We therefore conclude that Respondent's Motion to Dismiss may properly be granted and this matter dismissed with prejudice.

IT IS THEREFORE ORDERED that the Motion to Dismiss filed by Commonwealth Edison Company on March 23, 1998 may properly be granted and the Complaint filed by Richard Moenning on October 15, 1997 against Commonwealth Edison Company, be and the same is, hereby dismissed with prejudice.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 23rd day of September, 1998.

(SIGNED) RICHARD L.
MATHIAS
Chairman

(SEAL)

Docket No: 97-0528
Bench Date: 11/16/98
Deadline: 11/17/98

MEMORANDUM

TO:	The Commission
FROM:	Mark Goldstein and Erin M. O'Connell, Hearing Examiners
DATE:	November 12, 1998
SUBJECT:	Richard Moenning -vs- Commonwealth Edison Company Complaint as to billing in Chicago, Illinois.
RECOMMENDATION:	Deny Application for Rehearing.

On October 28, 1998, Richard Moenning ("Complainant") filed an Application for Rehearing ("Application") of the Commission's Order entered September 23, 1998 denying his complaint against Commonwealth Edison Company.

In his Application, Complainant asserts four bases to support his contention that rehearing must be granted. He avers that the Order as entered is not supported by substantial evidence, beyond the scope of the Commission's jurisdiction, violates the Illinois Public Utilities Act ("the Act") and the due process clauses of the United States and Illinois Constitutions and furthermore violates the Commission's Rules of Practice.

In accordance with Section 110-113 (a) of the Act, Complainant was required to file his application for rehearing within 30 days after service of the Commission's Order. The Order in this docket was served on the parties on September 25, 1998. Any applications for rehearing were required to be filed by October 26, 1998. Complainant's Application was filed October 28, 1998. We conclude under Illinois law, Complainant's Application was filed two days late and is, therefore, untimely and on that basis alone should be barred.

Nevertheless, turning to the merits of Complainant's Application, we find that the arguments set forth therein are merely reassertions of arguments which have been thoroughly considered and rejected by the Commission in its Order. For these reasons, we recommend that Complainant's Application be denied.

EOC:jt

STATE OF ILLINOIS
[SEAL]
ILLINOIS COMMERCE COMMISSION

November 20, 1998

RICHARD C. MOENNING	:	
-VS-	:	97-0528
COMMONWEALTH EDISON COMPANY	:	Pamela B. Strobel Vice President & General Counsel Commonwealth Edison Company P.O. Box 767 Chicago, IL 60690-0767
Complaint as to billing in Evanston, Illinois.	:	
Richard C. Moenning 135 S. LaSalle St., Ste. 3600 Chicago, IL 60603	:	

Paul F. Hanzlik
Hopkins & Sutter
Three First National Plaza
Suite 4100
Chicago, IL 60602

CERTIFICATE OF COMMISSION ACTION

Dear Sir/Madam:

Notice is hereby given that the Commission in conference on November 17, 1998, **HAS ENTERED AN ORDER TO DENY** the Verified Application for Rehearing filed on behalf of Richard Moenning on October 28,

1998 of the Order entered on September 23, 1998 and served on September 25, 1998.

Sincerely,

/s/ Donna M. Caton
Donna M. Caton
Chief Clerk

da
Hearing Examiners: Ms. O'Connell & Mr. Goldstein

OTHER RELEVANT ORDERS

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

Richard C. Moenning	)	
Petitioner	)	
v.	)	No. 99-0232
Illinois Commerce Commission and Commonwealth Edison	)	
Respondents	)	

ORDER

On the Motion of Richard C. Moenning for Leave to Appeal pursuant to Rule 303(E) and to File a Petition for Review as of December 24, 1998, due notice given and the Court considering the circumstances explaining the late filing of the Petition for Review pursuant to Rule 335

It is Ordered the Motion is (Allowed) (~~denied~~) The Clerk is directed to proceed accordingly.

(Entered Jan. 27, 1998)

Name Richard C. Moenning
Attorney for Petitioner
Address 135 S. LaSalle St #3600
City Chicago ILL 60603
Telephone 312 263 0062

/s/ Calvin C. Campbell
Justice

_____
Justice

_____
Justice

GILBERT S. MARCHMAN, CLERK OF THE APPELLATE COURT, FIRST DISTRICT

No. 99-0232

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD C. MOENNING Complainant-Appellant, v. ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY, Respondent-Appellees.	)	Petition For Review of Order of Illinois Commerce Commission Case No. 97-0528

ORDER

This matter having come to be heard on Commonwealth Edison Company's, motion, all parties having been duly notified, and the Court being advised in the premises,

IT IS HEREBY ORDERED:

That Commonwealth Edison Company's motion to dismiss the appeal is allowed/~~denied~~.

/s/ Calvin C. Campbell
Presiding Justice

/s/ Patrick J. Quinn
Justice

/s/ Robert Chapman Buckley
Justice

ORDER ENTERED

Dated: MAR 29 1999 APPELLATE COURT, FIRST DISTRICT

Paul F. Hanzlik
E. Glenn Rippie
Karen Kremer Mahoney
Hopkins & Sutter
Three First National Plaza
Chicago, Illinois 60602
(312) 558-6600

Attorneys for Respondent-Appellee
Commonwealth Edison Company

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

RICHARD C. MOENNING, Petitioner-Appellant, v. ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY, Respondents-Appellees.	)	No. 1-99-0232

ORDER

Upon consideration of the Petition for Rehearing filed by Petitioner-Appellant, RICHARD C. MOENNING, on April 19, 1999, for reconsideration of this Court's March 29, 1999, order allowing appellee's motion to dismiss,

IT IS HEREBY ORDERED that said Petition for Rehearing is ~~ALLOWED~~/DENIED.

/s/ Calvin C. Campbell
JUSTICE

/s/ Patrick J. Quinn
JUSTICE

/s/ Robert Chapman Buckley
JUSTICE

ORDER ENTERED
MAY 07 1999
APPELLATE COURT, FIRST DISTRICT

[SEAL]
SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST.
CHICAGO 60601
(312) 793-1332

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(312) 793-1333

June 30, 1999

Mr. Richard C. Moenning
135 S. LaSalle Street, Suite 3600
Chicago, IL 60603

In re: Richard C. Moenning, movant, v. Hon. Calvin C. Campbell, et al., etc., respondents.
No. 87681

Today the following order was entered in the captioned case:

Motion by movant for a supervisory order. Motion Denied.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Robert C. Buckley
Hon. Calvin C. Campbell
Mr. John P. Kelliher
Hon. Morton Zwick
Hon. Patrick J. Quinn
Mr. John C. Ford

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT

87680

SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 6, 1999

Mr. Richard C. Moenning
135 S. LaSalle Street, Suite 3600
Chicago, IL 60603

No. 87680 – Richard C. Moenning, petitioner, v. Illinois Commerce Commission et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1999.

[SEAL]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST.
CHICAGO 60601
(312) 793-1332

TELECOMMUNICATIONS
DEVICE
FOR THE DEAF
(217) 524-8132

TELECOMMUNICATIONS
DEVICE
FOR THE DEAF
(312) 793-1333

November 16, 1999

Mr. Richard C. Moenning
135 S. LaSalle Street, Suite 3600
Chicago, IL 60603

TODAY THE FOLLOWING ORDER WAS ENTERED:

No. 87680 – Richard C. Moenning, petitioner, v. Illinois Commerce Commission et al., respondents. Motion by petitioner, pro se, for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion *denied*.
Order entered by the Court. Rathje, J., took no part.
Mandate has issued forthwith to the Appellate Court, First District.

cc: Mr. John P. Kelliher
Mr. John C. Ford

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

January 10, 2000

Mr. Richard Moenning
135 South LaSalle St.
Suite 3600
Chicago, IL 60603

re: Richard Moenning
v. Illinois Commerce Commission, et al.
Application No. 99A563

Dear Mr. Moenning:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on January 10, 2000, extended the time to and including February 8, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By

/s/ Sandra Elliott Spagnolo
Sandra Elliott Spagnolo
Assistant Clerk

MATERIAL REQUIRED BY SUBPARAGRAPH .1(f)

CONSTITUTION AND STATUTES INVOLVED

ILLINOIS CONSTITUTION, ARTICLE 6, SECTION 6:

* * * * The Appellate Court shall have such powers of direct review of administrative action as provided by law.

The Public Utility Act, Section 10-201 (220 ILCS 5/10-201):

(a) Jurisdiction. Within 35 days from the date that a copy of the . . . decision sought to be reviewed was served upon the party affected . . . , any person . . . may appeal to the appellate court of the judicial district in which the subject matter of the hearing is situated,. . . .

(b) Pleadings and Record. . . . The party taking such an appeal shall file with the Commission written notice of appeal. The Commission, upon the filing of such notice of appeal, shall, within 5 days thereafter, file with the clerk of the appellate court to which such appeal is taken a certified copy of the order appealed. . . . The party serving such notice of appeal shall, within 5 days after the service of such notice upon the Commission, file a copy of the notice, with proof of service, with the clerk of the court to which such appeal is taken, and thereupon the appellate court shall have jurisdiction over the appeal. . . .

* * * *

(e) Powers and duties of Reviewing Court:

(i) An appellate court to which any such appeal is taken shall have the power, and it shall be its duty, to hear and determine such appeal with all convenient speed. Any proceeding in any court in this State directly affecting a rule, regulation, order or decision of the Commission, or to which the Commission is a party, shall have priority in hearing and determination over all other civil proceedings pending in such court, excepting election contests.

(ii) If it appears that the Commission failed to receive evidence properly proffered, . . . the court shall remand the case, in whole or in part, to the Commission with instructions. . . .

(iii) If the court determines that the Commission's . . . decision does not contain findings or analysis sufficient to allow an informed judicial review thereof, the court shall remand . . . the decision, in whole or in part, with instructions. . . .

(iv) The court shall reverse a Commission . . . decision, . . . , if it finds that:

A. The findings of the Commission are not supported by substantial evidence based on the entire record of evidence . . . ; or

B. The . . . decision is without the jurisdiction of the Commission; or

C. The . . . decision is in violation of the State or federal constitution or laws; or

D. The proceedings or manner by which the Commission considered and decided its . . . decision were in

violation of the State or federal constitution or laws, to the prejudice of the appellant.

* * * *

Article III. Administrative Review Law (735 ILCS 5/3-101 et.seq.):

Section:

5/3/101. Definitions

5/3/102. Scope of Article

5/3/103 Commencement of Action

5/3/104 Jurisdiction and venue

5/3/105 Service of Summons

5/3/106 Appearance of Defendants

5/3/107 Defendants

5/3/108 Pleadings and Record on Review

5/3/109 Costs of preparing and certifying record of proceedings before agency.

5/3/110 Scope of Review

5/3/111 Powers of Circuit Court

5/3/112 Appeals

5/3/113 Direct Review of Administrative orders by the Appellate Court:

(a) Unless another time is provided specifically by the law authorizing the review, an action for direct review of a final administrative decision of an administrative agency by the appellate court shall be commenced

by the filing of a petition for review in the appellate court within 35 days from the date that a copy of the decision sought to be reviewed was served. . . .

(b) The petition for review shall be filed in the appellate court and shall specify the parties seeking review and shall designate the respondent and the order . . . to be reviewed. The agency and all other parties of record shall be named respondents. . . .

RULE 335. Direct Review of Administrative Orders by the Appellate Court

The procedure for a statutory direct review of orders of an administrative agency by the appellate Court shall be as follows:

(a) The Petition for Review. The petition for review shall be filed in the Appellate Court and shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. The agency and all other parties of record shall be named respondents. The form of the petition shall be as follows:

IN THE APPELLATE COURT OF ILLINOIS
FOR THE _____ DISTRICT

[Name of Petitioner] Petitioner, v [Names of Agency and Other Parties of Record]* Respondent.	Petition for Review of Order of the [Name of Agency] And Docket Number

[Name of Petitioner] hereby petitions the Court for review of the order [or part of the order] of the [name of Agency] which [describes the order or part as to which review is sought] entered on _____, 19__

_____

Attorney for Petitioner
Address:

---

* If the other parties of record are numerous, they may be listed on a separate page instead of in the caption.

* * *

(i) Application of other Rules and Administrative Review Law.

(1) Insofar as appropriate, the provisions of Rules 301 through 373 (except for Rule 326) are applicable to proceedings under this rule. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

(2) Section 3-101, 3-108(c), 3-109, 3-110, and 3-111 of the Code of Civil Procedure are applicable to proceedings to review orders of the agency. The Appellate Court has all of the powers which are vested in the Circuit Court by the above enumerated sections.

* * *

RULE 383. Appeals from Final Judgment of the Circuit Courts in Civil Cases

* * *

(d) Extension of Time in Certain Circumstances. On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time accompanied by the proposed notice of appeal and the filing fee, filed in the reviewing court within 30 days after expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice of appeal to the trial court for filing.

* * *

83 ILLINOIS ADMINISTRATIVE CODE

SUBPART D: HEARING PROCEDURE

Section 200.500 Authority of Hearing Examiner

The Hearing Examiner shall have authority over the conduct of a proceeding and the responsibility for submission of the matter to the Commission for decision. The Hearing Examiner shall have those duties and powers necessary to these ends, consistent with applicable statutes and Commission rules and policies, including the following:

* * *

d) To rule upon all objections, motions and petitions which do not result in the final determination of the proceeding, and to receive evidence.

* * *

MATERIAL REQUIRED BY RULE 14.1(g)(i)

Petitioner's Formal Complaint to
Illinois Commerce Commission

* * *

8. Sections 280.50, 280.60, and 280.70 are unconstitutional in that such practices and procedures deprive complainant and other public utility customers of their property interests without due process of law and by systematic and discriminatory classifications, practices and procedures.

* * *

Page 3, "Richard C. Moenning's Response in Opposition To Commonwealth Edison's Motion For Dismissal of Complaint." Docket Entry, Vol. 1, C-00160 June 26, 1998:

Thus, Section 200.500 (d) proscribes action by the Hearing Examiners on motions which result in a final determination. So there is no mistake, Edison asks for final relief beyond the Commission's authority or jurisdiction by statute. . . . Since the legislature has never given the commerce Commissioner Edison, a regulated body, authority to dismiss any complaint with prejudice prior to an evidentiary hearing, Edison's motion must be denied.

Final Order of Commission, served September 25, 1998, page 2 – Appendix Item (i) herein.

OTHER ESSENTIAL MATERIAL

The Docket of the Illinois Commerce Commission in 97-0528 contains no entry respecting an evidentiary hearing.

Supreme Court, U.S.
FILED
MAR 2 4 2000
CLERK

(2)

No. 99-1343

In The

Supreme Court of the United States

RICHARD C. MOENNING,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON CO.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

PAUL F. HANZLIK
Counsel of Record
ROBERT C. FELDMEIER
LORI A. NICHOLSON
HOPKINS & SUTTER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

PAMELA B. STROBEL
General Counsel
E. GLENN RIPPIE
Acting Associate General Counsel
Commonwealth Edison Company
One First National Plaza
Chicago, Illinois 60603

Attorneys for Respondent Commonwealth Edison Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

57pp

STATEMENT PURSUANT TO RULE 29.6

The parent corporation of Respondent Commonwealth Edison Company is Unicom Corporation, which is a publicly held company that owns more than 10% of Commonwealth Edison Company's stock.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents..... ii

Table of Cited Authorities iii

Statement of the Case 1

Reasons for Denying the Petition 4

I. There Is an Independent and Adequate State-Law Basis for the Judgment Below That Prevents This Court's Review 5

II. This Court Has No Jurisdiction Because There Is No Decision of the Highest State Court Available for Review in the Proceedings Below 10

III. No Due Process Violation Occurred in Connection with the Commission's Order 13

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

CASES:

Adams v. Robertson, 520 U.S. 83 (1997) 4, 5, 6

Barr v. City of Columbia, 378 U.S. 146 (1964) 7

Ford v. Georgia, 498 U.S. 411 (1990) 6, 7

Hathorn v. Lovorn, 457 U.S. 255 (1982) 6

Hoffman v. Illinois Human Rights Comm'n, 62 Ill. App. 3d 85, 379 N.E.2d 42 (1st Dist. 1978) 7

Howlett v. Rose, 496 U.S. 356 (1990) 8

Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990) 6, 7

John v. Paullin, 231 U.S. 583 (1913) 11, 12, 13

McGaughy v. Illinois Human Rights Comm'n, 165 Ill. 2d 1, 649 N.E.2d 404 (1995) 7

Moenning v. Commonwealth Edison Co., 139 Ill. App. 3d 521, 487 N.E.2d 980 (1st Dist. 1985) 2

Moenning v. Commonwealth Edison Co., No. 83-0475, Order dated November 20, 1984 2

Moenning v. Commonwealth Edison Co., No. 81-0382, Order dated July 7, 1983 2

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 8

Newman v. Gates, 204 U.S. 89 (1907) 10, 11, 12, 13

People v. Carter, 91 Ill. App. 3d 635, 415 N.E.2d 17 (1st Dist. 1980) 7

Puerto Rico Aqueduct & Sewer Auth. v. United States Envtl. Protection Agency, 35 F.3d 600 (1st Cir. 1994) 13

TABLE OF CITED AUTHORITIES – Continued

Page

Webb v. Webb, 451 U.S. 493 (1981) 6

Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) 14

STATUTES AND RULES:

28 U.S.C. § 1257 ..... 5, 10, 13

220 ILCS 5/1-101 *et seq.* 1

220 ILCS 5/4-101 1

220 ILCS 5/10-108 1

220 ILCS 5/10-201(a) 4, 7, 10

83 Ill. Admin. Code §§ 280.50, 280.60(e) 2

Supreme Court Rule 10(b), (c) 15

Illinois Supreme Court Rule 335 7

MISCELLANEOUS:

16B Charles Alan Wright, et al., *Federal Practice and Procedure* 6, 12

STATEMENT OF THE CASE

Respondent, Commonwealth Edison Company ("ComEd"), is a "public utility" as that term is defined in the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (the "Public Utilities Act" or the "Act"), that provides, *inter alia*, electric utility service to customers located in northern Illinois. Petitioner, Richard C. Moenning ("Moenning"), is an attorney and is also one of ComEd's customers. (Petition for a Writ of Certiorari (the "Petition") at 2).

On October 15, 1997, Moenning filed a formal complaint (the "Complaint") against ComEd with the Illinois Commerce Commission (the "Commission"), which is also a respondent here. (App. 1-4). The Commission regulates "public utilities" like ComEd in accordance with the Illinois Public Utilities Act. 220 ILCS 5/4-101. The Commission has jurisdiction over such complaints pursuant to section 10-108 of the Act. 220 ILCS 5/10-108.

Moenning alleged in his Complaint that "on or about June 11, 1997," ComEd "discontinued service" to his residence located in Evanston, Illinois. (App. 2). ComEd "restored service" later on that "same day," but subsequently required Moenning to make a $150 deposit in order to receive future electric service. (App. 2-3). Moenning alleged in his Complaint that, *inter alia*, the sections of the Illinois Administrative Code that permitted ComEd to require a deposit in these circumstances deprived him of "property interests without due process of law." (App. 3).

ComEd moved to dismiss Moenning's Complaint (App. 5-12), and stated that Moenning's electric service had been disconnected because Moenning "had failed to

pay the amount due on his [ComEd] account." (App. 7). ComEd also stated that after Moenning's service was restored, it had required that Moenning make a deposit as a condition of continued service as was provided for in the Illinois Administrative Code sections duly promulgated by the Commission. (App. 8 citing 83 Ill. Admin. Code §§ 280.50 & 280.60(e)).

ComEd moved to dismiss Moenning's Complaint because Moenning previously had raised the same contentions as those raised in the Complaint in two prior actions against ComEd. In both of those cases, the Commission had found that the Illinois Administrative Code sections that permitted ComEd to require customer deposits were consistent with the requirements of due process. (App. 9 citing *Moenning v. Commonwealth Edison Co.*, No. 81-0382, Order dated July 7, 1983; *Moenning v. Commonwealth Edison Co.*, No. 83-0475, Order dated November 20, 1984). Moenning had also raised the same claims against another utility after his telephone service was disconnected. In that case, the Illinois Appellate Court had rejected Moenning's claim that similar security deposit provisions of the Administrative Code violated due process. (App. 9 citing *Moenning v. Illinois Bell Telephone Co.*, 139 Ill. App. 3d 521, 487 N.E.2d 980 (1st Dist. 1985)).

Moenning responded to ComEd's Motion to Dismiss and did not deny that his electric service had been disconnected because he had not paid his electric bills. (App. 13-19).

On September 23, 1998, the Commission entered an Order (the "Order") granting ComEd's Motion to Dismiss

and denying Moenning's Complaint. (Petition, App. 1-7). The Commission concluded that there were no "outstanding issues of fact" that prevented the granting of ComEd's Motion. (Petition, App. 7). The Commission also rejected Moenning's due process claim, stating:

> The Commission is mindful that Complainant has filed several complaints before the Commission in the past. We find that the Orders entered in those dockets, involve a thorough review of the same allegations and issues challenging the regulations governing deposits presented as in the instant complaint. We find no compelling evidence presented in this complaint that would cause us to revisit those issues. We are of the opinion that the allegations and arguments presented by Complainant in both his Response to the Motion to Dismiss as well as his Brief on Exceptions amount to groundless assertions, are clearly without merit, and must be rejected.

(Petition, App. 6-7).

Moenning then attempted to appeal the Commission's Order through a number of filings with the Commission and the Illinois Appellate Court. On December 18, 1998, he filed a Notice of Appeal with the Commission Clerk (the "Notice of Appeal"). (App. 20-21). On December 24, 1998, he filed the same Notice of Appeal with the Appellate Court. (App. 22-25). Then, on January 20, 1998, Moenning filed a Motion for Leave to Appeal with the Appellate Court in which he requested leave to file a Petition for Review "as of December 24, 1998," a date almost one month earlier. (App. 26-29). On January 27, 1998, the Appellate Court allowed Moenning to file the Petition for Review. (Petition, App. 12).

ComEd moved to dismiss Moenning's appeal because: 1) Moenning failed to file his Notice of Appeal with the Appellate Court within five days after serving it on the Commission as required by § 10-201 of the Public Utilities Act; 2) Moenning did not file a Petition for Review with the Appellate Court within the time limits provided for in the Public Utilities Act or the Illinois Supreme Court Rules; and 3) Moenning did not name the Commission as a respondent in the Notice of Appeal as required by the Illinois Administrative Code. (App. 30-36). The Appellate Court granted ComEd's Motion and dismissed Moenning's appeal over Moenning's objection. (Petition, App. 13-14).

Moenning sought review by the Illinois Supreme Court, which was denied. (Petition, App. 16-18). Moenning now asks this Court to review his case, by writ of *certiorari*. In doing so, he claims that the Commission's Order was in excess of its "statutory authority" and that it therefore violated his due process rights. (Petition at 4-6).

REASONS FOR DENYING THE PETITION

There are a number of reasons for denying the Petition. First, the Illinois Appellate Court's dismissal of Moenning's appeal constitutes an "independent and adequate state-law ground" for the state court's judgment in this case that, pursuant to the decisions discussed below, prevents this Court from reviewing Moenning's federal claims. *E.g., Adams v. Robertson*, 520 U.S. 83, 86 (1997). Second, Moenning's own failure to properly perfect his

appeal means that there is no final judgment "rendered by the highest court in which a decision could be had" in this case, and that the requirements for this Court's jurisdiction pursuant to 28 U.S.C. § 1257 are not met. And third, even if this Court were to consider Moenning's due process claims regarding the Commission's Order, the Petition should still be denied because no due process violation occurred, and because the Petition identifies no issues worthy of this Court's review.

I.

THERE IS AN INDEPENDENT AND ADEQUATE STATE-LAW BASIS FOR THE JUDGMENT BELOW THAT PREVENTS THIS COURT'S REVIEW

As an initial matter, this Court should deny the Petition because there is an independent and adequate state-law basis for the state court's judgment in this case that precludes the review of Moenning's federal due process claims.

"With only rare exceptions," this Court has held that "in reviewing state court judgments under 28 U.S.C. § 1257" (which Moenning is invoking here), it will "not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision" it has been asked to review. *Adams*, 520 U.S. at 86. The purpose of this rule is to promote comity between the state and federal courts because, as the Court has noted, " 'it would be unseemly in our dual system of government' to disturb . . . state court judgments on a federal ground that the state court

did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). The rule also prevents this Court from issuing advisory opinions on federal issues where the outcome of a case turned on a matter of local law. *See generally* 16B Charles Alan Wright, et al., *Federal Practice and Procedure* § 4021, at 311.

In this case, the Illinois Appellate Court expressly held that Moenning had not properly perfected his appeal from the Commission's Order under Illinois law. (App. 30-36; Petition, App. 13-14). The imposition of a state-law procedural bar – such as the dismissal of Moenning's appeal for his own failure to perfect it – can prevent a federal issue from being "properly presented" to the state court and preclude later Supreme Court review. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1990); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 398 (1990). The Court has recognized that "the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question." *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982) (citations omitted). When a state-law procedural rule has barred consideration of a federal claim below, a petitioner seeking review in this Court "must persuade [the Court] that state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. . . . " *Adams*, 520 U.S. at 87 (citing *Hathorn*, 457 U.S. at 262-65).

Here, the Appellate Court's decision that Moenning had not properly perfected his appeal is an "independent and adequate state-law" basis for the state court's judgment. Regardless of the merits of Moenning's federal claims (of which, as discussed below, there are none), the

Appellate Court's dismissal provides an independent state-law basis why further review in this case is not available, and why Moenning's current Petition for review in this Court should be denied.

Admittedly, this Court will consider whether a state procedural rule is "strictly or regularly followed" in determining whether it is an appropriate basis for barring review of a federal claim. *Swaggart*, 493 U.S. at 398; *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). That is certainly the case here. It is well settled under Illinois law that the procedures for effecting the right to appeal are entirely statutory and thus must be complied with to invoke Appellate Court jurisdiction. *E.g., People v. Carter*, 91 Ill. App. 3d 635, 638, 415 N.E.2d 17, 19 (1st Dist. 1980) ("the procedures for effecting th[e] right to appeal are purely statutory and must be complied with in order to invoke the Appellate Court jurisdiction"). The Illinois courts regularly dismiss appeals that fail to comply with state procedural rules, including appeals that fail to comply with the Public Utilities Act section and Illinois Supreme Court Rule at issue here. *See, e.g., McGaughy v. Illinois Human Rights Comm'n*, 165 Ill. 2d 1, 15-16, 649 N.E.2d 404, 411-12 (1995) (dismissing appeal for party's failure to name necessary parties as required by Supreme Court Rule 335); *Hoffman v. Illinois Commerce Comm'n*, 62 Ill. App. 3d 85, 87-88, 379 N.E.2d 42, 44 (1st Dist. 1978) (dismissing appeal for failure to file timely notice of appeal under precursor to § 10-201 of the Public Utilities Act). This is not a case where the Illinois courts have resorted to "novel" procedural requirements to "thwart" Moenning's efforts to raise his federal constitutional claims. *Ford*, 498

U.S. at 423 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)).

Moenning cites to *Howlett v. Rose*, 496 U.S. 356, 366 (1990), where the Court held that "it is within our province to inquire not only whether [a federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision without any fair or substantial support." (Petition at 4). However, Moenning ignores the portion of the Court's opinion in *Howlett* that applies here, which states:

> When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law.

Howlett, 496 U.S. at 372 (citations omitted). This case involves the application of a "neutral state rule regarding the administration of the courts" that the *Howlett* Court correctly observed should not be disturbed. It does not

involve the denial of Moenning's federal rights by virtue of the imposition of state procedural rules that are "without any fair or substantial support." There is no reason to conclude that the Appellate Court resorted to the state-law procedural rules concerning the proper perfection of appeals from the Commission to avoid consideration of Moenning's federal claims. Moreover, Moenning does not (and cannot) claim that the Illinois appellate rules applied here should be preempted in favor of some alternative federal rule.

Finally, Moenning attempts to build a case in the Petition that there was an effort in the Appellate Court to rely on state procedural grounds to deny the review of his federal claims. In particular, he claims that this case raises the "perplexing question of whether [an] agency (i.e., the Commission) itself ought to control the process of judicial review." (Petition at 7). The gist of this argument appears to be Moenning's claim that the Commission somehow controlled the perfection of his appeal. Moenning claims, for example, that after he filed the Notice of Appeal with the Commission (App. 20-21), the appeal went "undocketed" in the Appellate Court "even as the time for appeal expired." (Petition at 7).

Moenning's contentions are incorrect. Moenning – not the Commission – controlled the perfection of his appeal in the Appellate Court. The relevant section of the Public Utilities Act says as much – it states that a party who has filed a notice of appeal with the Commission "shall, within 5 days after the service of such notice upon the Commission, file a copy of the notice . . . with the clerk of the court to which such appeal is taken, and thereupon the appellate court shall have jurisdiction over

the appeal." 220 ILCS 5/10-201(a). There is nothing perplexing. It was Moenning's own failure to follow the requirements of Illinois law that led to the dismissal of his appeal.

II.

THIS COURT HAS NO JURISDICTION BECAUSE THERE IS NO DECISION OF THE HIGHEST STATE COURT AVAILABLE FOR REVIEW IN THE PROCEEDINGS BELOW

Under 28 U.S.C. § 1257, this Court's jurisdiction extends to the review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" where specified federal rights are at issue. 28 U.S.C. § 1257(a). Because Moenning did not properly perfect his appeal from the Commission's Order, there is no judgment or decree "rendered by the highest court of a state in which a decision could be had" at issue in this case, and the jurisdictional requirements of § 1257 are therefore not satisfied.

Newman v. Gates, 204 U.S. 89 (1907) involved this very situation. There, review was sought in this Court from an action litigated in the Indiana state courts that involved consideration of federal issues. The Indiana Supreme Court, however, held that the appeal from the trial court had not been properly perfected and that the appellate court did not have jurisdiction. This Court thus held that it did not have jurisdiction to review the federal issues in the case because, as a result of the improper appeal, there was no decision from the "highest court where a decision

could be had," and that the prerequisites of this Court's jurisdiction were not met. The Court stated:

> Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution. . . . *In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court.* As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Newman, 204 U.S. at 95 (emphasis added).

The same result was reached in *John v. Paullin*, 231 U.S. 583 (1913), where, as in *Newman*, the state supreme court had held that a prior appeal was not properly perfected. Citing to *Newman*, the Court held that it did not have jurisdiction to review the federal questions the case presented, stating:

> As the Supreme Court of the State did not pass upon the merits of the case . . . but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the

> State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.

John, 231 U.S. at 585 (citation omitted). Because the decision below "turned entirely upon a question of local law," the court held that the writ of error would be dismissed. *John*, 231 U.S. at 587.

Finally, one commentator has described the holdings of these cases in the following way:

> In addition to seeking review by the proper method, a litigant must comply with the requirements of state appellate procedure. If the state's highest court denies review for failure to comply with reasonable procedural rules, 'the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court.' In this setting, the requirement that state opportunities for appellate relief be exhausted becomes mingled with the independent state ground doctrine. Noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider the federal questions, as not properly presented to the highest state court.

16B Charles Alan Wright, et al., *Federal Practice and Procēdure* § 4007, at 133-34 (quoting *Newman*, 204 U.S. at 223) (citations omitted).

Newman and *John* are applicable here. Because Moenning did not properly perfect his appeal below, there is no judgment in this case "rendered by the highest court of a state in which a decision could be had. . . . " As a result, the requirements of this Court's jurisdiction pursuant to 28 U.S.C. § 1257 have not been met.

III.

NO DUE PROCESS VIOLATION OCCURRED IN CONNECTION WITH THE COMMISSION'S ORDER

Finally, even if this Court were to consider Moenning's due process claims concerning the Commission's Order (which it should not, for the reasons stated above), the Petition should still be denied. There are no issues discussed in Moenning's Petition that suggest that Moenning's due process rights were violated, or that substantial due process issues exist that warrant review by this Court.

The gist of Moenning's due process claim appears to be that the Commission made its "final decision without an evidentiary hearing. . . . " (Petition at 5). However, where, as here, the operative facts are undisputed, due process does not require the agency to hold an evidentiary hearing before resolving a claim. As one Court has observed, "[d]ue process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way." *Puerto Rico Aqueduct & Sewer Auth. v. United States Envtl. Protection Agency*, 35 F.3d 600, 606 (1st Cir. 1994), *cert.*

denied, 513 U.S. 1148, 115 S.Ct. 1096 (1995) (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973)). Similarly, this Court has recognized that due process does not require an administrative agency to hold "a hearing when it appears conclusively from the applicant's pleadings" submitted to the agency "that the application cannot succeed." *Hynson*, 412 U.S. at 621.

The rule in these decisions is applicable here. The facts before the Commission were undisputed – Moenning's electric service had been disconnected because he had not paid his bills and he was then required to make a security deposit as a condition of future service. Based on these uncontested facts, the Commission concluded that Moenning's due process rights had not been violated. There was no need for a hearing because the few facts at issue were not in dispute.

Moenning also claims that the Commission "exceeded its jurisdiction" in denying his Complaint without holding a hearing. (Petition at 5). This contention, however, involves the scope of the Commission's jurisdiction under the Illinois Public Utilities Act. It was rejected by the Commission when it issued its Order. The scope of the Commission's jurisdiction turns entirely on an interpretation of an Illinois law and, as such, is not an appropriate subject for this Court's review.

Finally, even assuming that Moenning does raise a valid due process issue in his Petition (which he does not), the Petition should nonetheless be denied because Moenning has completely failed to demonstrate that the issue is worthy of review by this Court. This Court's Rules provide that review of state court decisions will be

extended only in certain circumstances, such as when a "state court of last resort" has decided "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" (Supreme Court Rule 10(b)), or where a state court has decided "an important question of federal law that has not been, but should be, settled by this Court." (Supreme Court Rule 10(c)). Moenning's Petition does not demonstrate that the due process issues discussed therein are of such significance that they are worthy of this Court's consideration pursuant to the requirements in the Court's Rules.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, ComEd respectfully contends that Moenning's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAUL F. HANZLIK
Counsel of Record
ROBERT C. FELDMEIER
LORI A. NICHOLSON
HOPKINS & SUTTER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

PAMELA B. STROBEL
General Counsel
E. GLENN RIPPIE
Acting Associate General Counsel
Commonwealth Edison Company
One First National Plaza
Chicago, Illinois 60603

Attorneys for Commonwealth Edison Company

FORMAL COMPLAINT

Illinois Commerce Commission
527 East Capitol Avenue
Post Office Box 19280
Springfield, Illinois 62794-9280

For Commission Use Only:

Case 97-0528

(Filed Oct. 15, 10:07 a.m. 1997)

Regarding a complaint

by Richard C. Moenning
(Person making the complaint)

against Commonwealth Edison
(Utility name)

as to an additional rate or charge of $150.00

(Reason for complaint)

in Evanston Illinois.

TO THE ILLINOIS COMMERCE COMMISSION, SPRINGFIELD, ILLINOIS:

My mailing address is 135 S. LaSalle Street, Suite 3600, Chicago, Illinois 60603

The service address that I am complaining about is 2210 FOrestview Road, Evanston, Illinois 60201

My home telephone number is [847] 869-3418

Between 8:30 a.m. and 5:00 p.m. weekdays I can be reached at [312] 263-0062

Commonwealth Edison (*respondent*) is a
(Full name of utility company)
public utility and is subject to the provisions of the Illinois Public Utilities Act.

In the space below, list the specific section of the law, Commission rule(s), or utility tariffs which you think are involved with your complaint.

220 ILCS 5/9-101; 83 Illinois Administrative Code Parts 280.50, 280.60, and 280.70

Have you contacted the Consumer Affairs Division of the Illinois Commerce Commission about this complaint?
X Yes ___ No

Has your complaint filed with that office been closed?
X Yes ___ No

Formal Complaint

1. Complainant has been and is a present customer of Commonwealth Edison since October 1, 1971, a period of 25 years, always at 2210 Forestview Road, Evanston, Illinois.

2. Commonwealth Edison alleges it "discontinued service on or about June 11, 1997, and restored service the same day; and, refuses complainant and Commission access to its records as "confidential."

3. There is no known or approved provision of applicable rules and regulations that makes Commonwealth Edison's allegations "confidential."

4. Commonwealth Edison demands complainant pay it an additional sum of money ($150.00) for its "confidential" discontinuance of service. The demand was made sometime in July or August 1997, and Commonwealth Edison asserts its right to discontinue service again unless complainant agrees it has the right to make any "confidential" discontinuance of service and to exact an additional rate or charge therefor.

5. The Commission has failed or refused to investigate complainant's "informal" complaint that Commonwealth Edison's records are not confidential, and agrees Commonwealth Edison can demand additional payment if its "confidential" records say service was discontinued.

6. The Commission has failed or refused to consider whether Sections 280.50, 280.60, and 280.70 of 83 Illinois Administrative Code were and are lawful and provide for a lawful rate or charge for electrical service that is not discriminatory given the allegations of Commonwealth Edison that it lawfully "discontinued" service on or about June 11, 1997.

7. Sections 280.50, 280.60, and 280.70 are unlawful and unregulated practices and procedures of Commonwealth Edison submitted to the Commission in violation of 220 ILCS 5/9-101 in that such sections provide for unjust, discriminatory, and unreasonable rates and charges prohibited and declared unlawful.

8. Sections 280.50, 280.60, and 280.70 are unconstitutional in that such practices and procedures deprive complainant and other public utility customers of their property interests without due process of law and by

systematic and discriminatory classifications, practices and procedures.

WHEREFORE, Complainant asks the Commission to declare Commonwealth Edison's customer or consumer records are not confidential and must be fully disclosed to the customer upon request without additions, deletions, or corrections; to award complainant a right of discovery to examine, copy, and verify computer entry statements, dates, times, and codes denied by Commonwealth Edison but relied upon by it to seek to impose an additional, unreasonable, and discriminatory rate and charge for electrical service; to temporarily and permanently enjoin enforcement of Sections 280.50, 280.60, and 280.70 as unjust, unreasonable, discriminatory rates, and charges; and to require Commonwealth Edison to furnish electrical service to complainant without unjust, unreasonable, and discriminatory rates.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

RICHARD C. MOENNING, Formal Complainant	:	
v.	:	97-0528
COMMONWEALTH EDISON COMPANY, Respondent	:	

COMMONWEALTH EDISON COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR DISMISSAL OF COMPLAINT

(Filed Mar. 23, 12:02 p.m. 1998)

Respondent, COMMONWEALTH EDISON COMPANY ("ComEd"), by its attorneys, submits this memorandum which supports its motion to dismiss the complaint filed against ComEd by Complainant Richard C. Moenning for failing to state a claim for which relief can be granted.

INTRODUCTION

Complainant alleges that the Commission's regulations concerning security deposits, namely Sections 280.50, 280.60, and 280.70, "are unlawful and unregulated practices and procedures of Commonwealth Edison" and that such sections are "unconstitutional." (Complaint, ¶¶ 4, 6, 7, 8). Complainant further alleges that ComEd treats certain records as "confidential" and refused to give him access to such records. (Complaint, ¶ 2).

Neither of these claims has any merit. Complainant fails to state a claim for which the Commission can grant relief under either the Illinois Public Utilities Act (220 ILCS 5/1-101 *et seq.*, as amended) (the "Act") or the Commission's rules and regulations. Nowhere in the Complaint does he point to any act or omission of ComEd that violates the law. Moreover, the Commission previously ruled against Complainant in two different proceedings involving substantially similar allegations, finding on both occasions that the Commission's regulations and orders concerning security deposits were lawful. (*Moenning v. Commonwealth Edison Company,* Docket No. 81-0382, Order dated July 7, 1983; *Moenning v. Commonwealth Edison Company,* Docket No. 83-0475, Order dated Nov. 20, 1984). As a result, the Complaint should be dismissed with prejudice.

ARGUMENT

Section 200.170(c) of the Commission's regulations requires that a complaint contain:

> [a] plain and concise statement of the nature of . . . the acts or things done or omitted to be done in violation, or claimed to be in violation, of any statute, or any order or rule of the Commission.

83 Ill. Admin. Code § 200.170(c); *see also* 220 ILCS 5/10-108. Complainant has failed to provide any such statement as to the nature of any alleged violation of a statute, or an order or rule of the Commission. Indeed, ComEd fully complied with the Commission's rules and

regulations and the Act in discontinuing Complainant's electric service.

The Complaint Raises No Contested Factual Issues

On July 11, 1997, Complainant's electric service was discontinued, pursuant to 83 Ill. Admin. Code § 280.130, because Complainant failed to pay the amount due on his account. The same day, Complainant paid the amount owed, and his service was reconnected. (*See* Complaint, ¶ 2). Pursuant to the rules and regulations of the Commission, ComEd required Complainant to pay a security deposit for continued service. (*See* Complaint, ¶ 4; 83 Ill. Admin. Code § 280.50, 280.60, and 280.70).

There is no dispute that Complainant's electric service was discontinued on June 11, 1997. While the complaint coyly says only that ComEd "alleges" that it discontinued service on that date (Complaint, ¶ 2), Complainant admitted on the record that his service had in fact been disconnected. (Transcript from Nov. 13, 1997, at 15).

The Complaint does not allege that Complainant's electric service was discontinued in error. Nor does the Complaint allege that such discontinuance violated the Act or any Commission regulation. Furthermore, there is no issue of fact as to whether ComEd demanded a deposit from Complainant after his service was discontinued. (Complaint, ¶ 4). ComEd does not deny this fact.

ComEd's Request For Deposit Is Indisputably Legal

The Commission's regulations and prior orders unquestionably allow ComEd to request a deposit from customers who have been disconnected for non-payment. Section 280.60(e) of the Commission's regulations states:

> A present customer whose service is discontinued becomes an applicant for service subject to the provisions of Section 280.50 herein for purposes of reconnection of his/her service.

83 Ill. Admin. Code § 280.60(e). Section 280.50, referenced above, allows a utility to require a deposit from an applicant for residential service who has previously failed to pay for past due utility service. 83 Ill. Admin Code § 280.50.

Here, Complainant failed to pay for electric service, and was discontinued as a result. Since he was disconnected for nonpayment of his bill, he became a new applicant for service subject to the payment of a security deposit as provided in the Commission's regulations. Such a deposit is explicitly authorized by the above sections of the Title 83 of the Illinois Administrative Code.

In addition, despite Complainant's bald allegations that Sections 280.50, 280.60, or 280.70 are unlawful, which allegations are addressed below, the Complaint contains no claim whatsoever that ComEd in any way violated these Sections when it requested such a deposit from him after the discontinuance at issue.

Complainant's Constitutional Claims Are Meritless And Were Previously Rejected

Complainant claims that the Commission's regulations governing deposits (Section 280.50, 280.60, and 280.70) are:

> unconstitutional in that such practices and procedures deprive complainant and other utility customers of their property interests without due process of law and by systematic and discriminatory classifications, practices and procedures.

(Complaint, ¶ 8). Complainant has previously filed two substantially similar complaints against ComEd and another against Illinois Bell Telephone, which also challenged the constitutionality of the Commission's orders and regulations authorizing security deposits. (*See* Docket No. 81-0382, Order dated July 7, 1983 (Attached as Exhibit A); Docket No. 83-0475, Order dated November 20, 1984 (Attached as Exhibit B); *Moenning v. Illinois Bell Telephone Co.*, 139 Ill. App. 3d 521, 487 N.E.2d 980 (1985) ("*Illinois Bell*") (Attached as Exhibit C)).

In all three cases, the Commission upheld the utility's right to require deposits when a customer has been discontinued for non-payment. And, in the *Illinois Bell* case, the Illinois Appellate Court upheld the Commission's finding that the security deposit requirement and termination of service did not give rise to a civil rights action or constitute a due process violation. *Illinois Bell*, 139 Ill. App. 3d at 527-28, 487 N.E.2d at 982.

Moreover, the Complaint contains no basis as to why Sections 280.50, 280.60, and 280.70 violate due process or

are discriminatory. Nor does the Complaint contain any facts or explanation that would distinguish this complaint from the other cases Complainant previously brought before this Commission. As such, this claim fails to state a claim on which relief can be granted, and should therefore be dismissed.

Complainant further claims that Sections 280.50, 280.60, and 280.70 are

> unlawful and unregulated practices and procedures of Commonwealth Edison submitted to the Commission in violation of 220 ILCS 5/9-101 in that such sections provide for unjust, discriminatory, and unreasonable rates and charges prohibited and declared unlawful.

(Complaint, ¶ 7). Again, the Complaint contains no facts or any explanation as to how such practices and procedures are unjust, discriminatory, or unreasonable or in any other way in violation of the Act.

Moreover, Complainant's allegation that these regulations are "unlawful and unregulated practices and procedures of Commonwealth Edison" is nonsensical. The deposit procedures contained in Sections 280.50, 280.60, and 280.70 have been properly adopted by the Commission as part of its rules and regulations and have the full power of law. Both the Commission and the Illinois Appellate Court have previously upheld these regulations. (*See Illinois Bell,* 139 Ill. App. 3d 521, 487 N.E.2d 980; *Moenning,* Docket 81-0382; and Moenning, Docket 83-0475). This claim should, therefore, be dismissed.

Complainant's "Confidentiality" Claim Is Immaterial And Moot

Complainant alleges that ComEd claimed that its records were "confidential" and that it refuses to give Complainant access to its records. (Complaint, ¶ 2). This allegation fails to state a claim for relief. The Complaint is void of any factual or legal basis upon which ComEd's alleged claim of "confidentiality" violates any law or any Commission regulation. Moreover, in response to discovery requests, ComEd has provided Complainant every relevant business record that he sought relating to the discontinuance in question. Because there is no remaining relief that can be granted to this particular Complainant, this issue is now moot. *Independent Coin Payphone Assoc. v. Illinois Commerce Commission*, 170 Ill. App.3d 958, 960, 524 N.E.2d 980, 981 (1st Dist. 1988).

CONCLUSION

For all of the foregoing reasons, Commonwealth Edison Company requests that the Illinois Commerce Commission grant its Motion For Dismissal of Complaint and enter an order dismissing the Complaint with prejudice.

Dated: March 20, 1998

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: /s/ Karen Kremer Mahoney
One of its attorneys

E. Glenn Rippie
Karen Kremer Mahoney
Hopkins & Sutter
Three First National Plaza
Suite 4300
Chicago, Illinois 60602

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

RICHARD C. MOENNING FORMAL COMPLAINANT V. COMMONWEALTH EDISON COMPANY RESPONDENT	)	97–0528

Richard C. Moenning's Response
In Opposition To Commonwealth Edison's
Motion For Dismissal Of Complaint

INTRODUCTION

Richard C. Moenning, herein sometimes "Moenning" or "Complainant", respectfully makes Response to Commonwealth Edison's (hereinafter sometimes "Edison" or "Respondent's") Motion For Dismissal of Complainant's Formal Complaint. For the reasons hereinafter made, neither of the Hearing Examiners assigned to this matter, nor the Commission has authority to grant the relief Edison requests. No relief is authorized.

EDISON'S MOTION IS DEFECTIVE

Edison's motion is directed to Moenning's formal complaint. The motion seeks dismissal with prejudice for failing to state a claim for which relief can be granted.

Even though Edison's motion is directed to the Commission, the Commission has no authority granted it by statute from the Legislature to grant the requested relief. See Sections 200.500 (d) and Section 200.820. Likewise the Administrative Procedure Act, 5 ILCS 100/1-1 *et. seq.* contains no authority to allow Edison final disposition of Moerning's complaint. For this reason, alone, the Commission is powerless to aid respondent. In *Business and Professional People For the Public Interest v. The Illinois Commerce Commission, 136 Ill 2d 192, 243, 555 N.E.2d 693 (1990)*, the Supreme Court answered Edison's assertions of Commission power, stating:

> "An administrative agency is different from a court because an agency only has the authorization given to it by the legislature through the statutes. Consequently, to the extent an agency acts outside its statutory authority, it acts without jurisdiction."

Again in *Business and Professional People For the Public Interest v. The Illinois Commerce Commission, 146 Ill 2d 175, 195, 585 N.E.2d 1032 (1991)* after repeating the fact that the Commerce Commission is an administrative agency whose power is derived from the legislature to make findirgs of fact, the Court, at page 196, stated:

> "Accordingly, our review of the Commission's orders is limited to determining whether the Commission: acted within the scope of its statutory authority,; . . . "

Since, respondent's motion contains no authority to the contrary, and indeed contains no authority period for its draconian action, it is sufficient for the Hearing Examiners o follow the law given them by the legislature and

to keep in focus the duty of the Commerce Commission is to determine facts; there is no judicial function intended by the legislature, at least until there are findings of fact.

Thus, Section 200.500 (d) proscribes action by the hearing Examiners on motions which result in a final determination. So there is no mistake, Edison asks for *final* relief beyond the Commission's authority or jurisdiction by statute. Pursuant to subsection (f) the hearing examiner has authority to issue recommendation or proposed orders pursuant to Section 200.820. Yet, that section requires the Hearing Examiner to make a recommended or proposed order **after the close of evidentiary hearings**. There has been no evidentiary hearing and in fact the thrust of Edison's submission seeks to avoid an evidentiary hearing.

Edison seems obsessed with the notion that the Commission is a court or has the power of a court. The Supreme Court has ruled to the contrary. Since the legislature has never given the Commerce Commission or Edison, a regulated body, authority to dismiss any complaint with prejudice prior to an evidentiary hearing, Edison's motion must be denied.

THE FORMAL COMPLAINT

It is vital to this case to remember Moenning's formal complaint was only filed after Edison violated Section 280.160, claiming its records were "confidential." The Commission allowed Edison to violate Section 280.160 and to demand a deposit in violation of Section 280.60 (e); the Commission was powerless to order Edison to comply with Section 280.160, including the "duty of hearing,

in person, any dispute by an applicant, customer or user." In fact, the Commission even endorsed Edison's violation stating that if Edison claimed Moenning's records were "confidential" then it was so. Moenning was forced to file this Formal Complaint or yield to Edison's abuse of statutory authority the Formal Complaint, Moenning stated the specific statutes Edison violated: 220 ILCS 5/9-101; and 83 Illinois Administrative Code Parts 280.50, 280.60, and 280.70. Edison's motion that "Nowhere in the Complaint does he point to any act or omission of ComEd that violates the law." is in error. See Formal Complaint, page 1 and paragraphs 2 through 5. What is novel, if not remarkable is the argument at page 6 of Edison's Memorandum that "Complainant's *Confidentiality* claim is immaterial and moot since as a result of the formal complaint Edison now asserts (1) Moenning has failed to show Edison has a duty of hearing in person any dispute in person and ***shall explain the Complainant's account*** (Section 280.160); and, (2) even so, Edison has now complied with the rule. The relevant question must be by what authority does Edison claim "confidentiality" when no statute, rule, or regulation allows Edison to set up the claim in the first place. Indeed, when did the legislature shift the burden of proof to the customer.

The major portion of Edison's unauthorized and illegal motion concerns its argument regarding its request for a deposit. Moenning can concede for purposes of argument only that paragraphs 6, 7, and 8 of the formal complaint might well be repleaded and made more specific and precise in nature. Indeed, Edison's motion reveals the salient fact in dispute in this matter: whether **Edison terminated Moenning's service in error** and whether its

records fail to disclose Moenning's telephone call and stated intent to pay the amount actually paid on June 11, 1997, ***prior to termination.***

To the extent Edison believes the complaint is "coy" (page 3), it is important to remember the complaint was filed based upon Edison's allegations of lawful conduct, and Moenning's incomplete knowledge of Edison's claim of authority. Moenning indeed intends to file an amended complaint to address Edison's concerns, though this is better done after the Hearing Examiner compels Edison to comply with discovery. See Motion To Compel Discovery and Other Relief filed contemporaneously with this Memorandum.

Given the discovery allowed by Edison and the discovery refused by Edison, it borders on unethical conduct for Edison's counsel to claim no contested facts in this matter.

It should be observed that Edison continues to assert matters not of record in order to avoid an evidentiary hearing in this case. The fact that Moenning has twice done legal battle with Edison (Dockets 81-0382 and 83-0475), 17 years ago has no relevant significance other than perhaps Edison is accustomed to getting its way without argument, and apparently resents Moenning's reluctance to endorse Edison's abuse of authority. Edison does not even disclose to the hearing examiners by its submission that Docket 81-0382 was reversed in the Appellate Court. See Commission Counsel J.E.Weging's, 1-14-94, correspondence regarding a stipulation to dismiss, executed after Edison had abandoned its abuse of statutory authority.

Moenning believes an amended formal complaint is required to address Edison's current abuse of authority and this Commission's need to be apprised of the stated legislative authority for Sections 280.10 *et. seq.* Thus, Moenning intends to challenge Edison's reliance upon Section 280.60 (e) and its application to residential customers since Title 83 Part 280, Sections 280.10 through 280.200 are expressly intended to implement "the Small Business Utility Deposit Relief Act, 220 ILCS 35 and Section 8-101 and 8-207 of the Public Utilities Act 220 ILCS 5-8-101 and 8-207. Moenning seeks by an amended formal complaint to show evidence (facts to be obtained from Edison when it is required to allow discovery) that Title 83 Part 280 was never authorized by the Legislature to apply to residential customers. In this context Moenning's present allegations contained in paragraphs 6, 7, and 8 while perhaps inartfull or not sufficiently precise do not merit dismissal with prejudice. Any person familiar with prior dockets cited by Edison knows in a moment the citation of matters not of record in this matter are not authority for dismissal with prejudice.

Indeed, the Commerce Commission is required to take and consider evidence on the issues that are the subject of state law; i.e. whether 220 ILCS 5/8-101's requirement that all rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable permits Edison to claim Moenning's records of service are confidential; and whether 220 ILCS 5/9-101's requirement that all rates or other charges made, demanded or received . . . for any service rendered or to be rendered shall be just and reasonable, and whether Edison's demand that

Moennning pay it a deposit for erroneous termination is prohibited by the statutory requirement: Every unjust or unreasonable charge made, demanded or received for such . . . service is hereby prohibited and declared and unlawful.

CONCLUSION

For the reasons asserted in this memorandum Edison's Motion For Dismissal must be denied.

RICHARD C. MOENNING

Richard C. Moenning, 47034
135 S. LaSalle Street, Suite 3600
Chicago, Illinois 60603
312-263-0062 (voice)
312-263-0064 (facsimile)

APPEAL FROM THE
ILLINOIS COMMERCE COMMISSION

TO

THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

RICHARD C. MOENNING	)	
FORMAL COMPLAINANT	)	97-0528
V.	)	
COMMONWEALTH EDISON COMPANY	)	
RESPONDENT	)	

NOTICE OF APPEAL

(Filed Dec. 18, 11:25 a.m. 1998)

Richard C. Moenning, the undersigned "Complainant", appeals from the decision of the Illinois Commerce Commission served September 25, 1998, denying his complaint against Commonwealth Edison Company, and the decision of the Illinois Commerce Commission served November 20, 1998, denying his verified application for Rehearing timely filed October 26, 1998, and received by the Commission, October 27, 1998.

RICHARD C. MOENNING

PROOF OF SERVICE

I, the undersigned lawyer, pursuant to 220 ILCS 5/10-201, the Code of Civil Procedure and the Rules of the Illinois Supreme Court certify I served the above

Notice of Appeal upon the Clerk of the Illinois Commerce Commission by UPS Next Day Air Private Courier Service, December 17, 1998, before the hour of 9:00 P.M., prepaid.

Richard C. Moenning, 47034
135 S. LaSalle Street, Suite 3600
Chicago, Illinois 60603
312-263-0062 (voice)
312-263-0064 (facsimile)

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOR THE FIRST JUDICIAL DISTRICT
FROM THE ILLINOIS COMMERCE COMMISSION

RICHARD C MOENNING FORMAL COMPLAINANT APPELLANT V. COMMONWEALTH EDISON COMPANY RESPONDENT APPELLEE	)	COMMISSION DOCKET 97-0528

NOTICE OF FILING OF NOTICE OF APPEAL

To Karen Kremer Mahoney
Hopkins & Sutter
70 W. Madison
Suite 4100
Chicago Ill 60602

Clerk,
Illinois Commerce Commission
527 E. Capitol Ave
Springfield, Ill 62794

Please take notice that Thursday, December 24, 1998, I caused to be filed the foregoing Notice of Appeal in the above-entitled cause with the clerk of the Illinois Appellate Court, First Judicial District, a copy of which is served on you.

/s/ Richard C. Moenning
Appellant

CERTIFICATE OF SERVICE

I, the undersigned lawyer, certified, I served the foregoing Notice of Appeal and Notice of Filing by depositing the same in the U.S. Mail, First Class Postage Affixed, Addressed to the above named persons December 24, 1998, before 5:00 P.M. at The Loop Postal Station.

/s/ Richard C. Moenning
Lawyer

Richard C. Moenning 47034
Lawyer
135 S. LaSalle St. Suite 3600
Chicago Ill 60603
312 263 0062

APPEAL FROM THE ILLINOIS COMMERCE COMMISSION TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

RICHARD C. MOENNING	)	
FORMAL COMPLAINANT	)	97-0528
V.	)	
COMMONWEALTH EDISON COMPANY RESPONDENT	)	

NOTICE OF APPEAL

(Filed Dec. 18, 11:25 a.m. 1998)

Richard C. Moenning, the undersigned "Complainant", appeals from the decision of the Illinois Commerce Commission served September 25, 1998, denying his complaint against Commonwealth Edison Company, and the decision of the Illinois Commerce Commission served November 20, 1998, denying his verified application for Rehearing timely filed October 26, 1998, and received by the Commission, October 27, 1998.

_____

RICHARD C. MOENNING

PROOF OF SERVICE

I, the undersigned lawyer, pursuant to 220 ILCS 5/10-201, the Code of Civil Procedure and the Rules of the Illinois Supreme Court certify I served the above Notice of Appeal upon the Clerk of the Illinois Commerce

Commission by UPS Next Day Air Private Courier Service, December 17, 1998, before the hour of 9:00 P.M., prepaid.

Richard C. Moenning, 47034
135 S. LaSalle Street, Suite 3600
Chicago, Illinois 60603
312-263-0062 (voice)
312-263-0064 (facsimile)

99-0232

ILLINOIS APPELLATE COURT
FOR THE FIRST DISTRICT

RICHARD C. MOENNING	)	
Petitioner	)	Petition For Review
V.	)	of Order of the
ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY	)	Illinois Commerce Commission
Respondents	)	

MOTION FOR LEAVE TO APPEAL

Richard C. Moenning, respectfully moves this Honorable Court, pursuant to Rule 303(e) of the Rules of the Illinois Supreme Court for Leave To Appeal from the order of the Illinois Commerce Commission served September 25, 1998, denying his complaint against Commonwealth Edison Company, and the order of the Illinois Commerce Commission served November 20, 1998, denying his verified application for Rehearing timely filed October 26, 1998, and received by the Commission, October 27, 1998, and in support thereof verily states:

1. Richard C. Moenning (hereinafter sometimes "Moenning") is the formal complainant in proceedings against Commonwealth Edison before the Illinois Commerce Commission.

2. The Illinois Commission entered its order served September 25, 1998, denying his complaint against Commonwealth Edison Company. A verified application for

Rearing was timely filed October 26, 1998, and this was denied by the order of the Illinois Commerce Commission served November 20, 1998,

3. A timely Notice of Appeal was filed December 18, 1998, with the Clerk of the Illinois Commerce Commission, pursuant to 220 ILCS 5/10-201 (Appeal) and on December 24, 1998, upon receipt of the stamped Notice of Appeal from the Clerk of the Illinois Commerce Commission, Moenning complied with that portion of the statute which states: "The party serving such notice of appeal shall, within 5 days after the service of such notice upon the Commission, file a copy of the Notice, with proof of service, with the Clerk of the Court to which such appeal is taken, and thereupon the appellate court shall have jurisdiction over the appeal."

4. On January 11, 1999, certification of a single transcript was requested; and, on January 15, 1999, Moenning was notified by the Clerk of the Illinois Commerce Commission that the Clerk of the Appellate Court had not assigned a docket number. Upon prompt inquiry, January 19, 1999, Moenning was directed by the Administrative Attorney of the Appellate Court to file a Petition For Review as provided in Rule 335 of the Rules of the Illinois Supreme Court and to proceed pursuant to Rule 303(e).

5. The Notice of Appeal, the Notice of Filing of Notice of Appeal, and an Amended Notice of Filing time stamped respectively by the Office of the Clerk of the Illinois Commerce Commission and by the Office of the Clerk of the Illinois Appellate Court, together with a proposed Petition For Review, and a $25.00 docketing fee are attached to this Motion and made a part thereof.

7. The explanation for failure to obtain a docket number in this court, December 24, 1998, and to prepare and file a Petition For Review to comply with Rule 335, is that petitioner focused upon compliance with the apparent exclusivity of 220 ILCS 5/10-201 (Appeal) to the exclusion of Rule 335. Except for application of Rule 335, petitioner has perfected his appeal from the order of the Commerce Commission in reliance upon 220 ILCS 5/10-201.

WHEREFORE, petitioner respectfully seeks leave of the Appellate Court to file a Petition For Review Instanter as of December 24, 1998, and to proceed with this appeal in as much as there has been timely compliance with the applicable statute, and for other and further relief as in the premises is just and equitable.

RICHARD C. MOENNING

PROOF OF SERVICE

I, the undersigned lawyer, pursuant to 220 ILCS 5/10-201, the Code of Civil Procedure and the Rules of the Illinois Supreme Court certify I served the above Motion For Leave To Appeal upon the Clerk of the Illinois Commerce Commission by UPS Next Day Air Private Courier Service, January 20, 1999, before the hour of

9:00 P.M., prepaid, and upon Commonwealth Edison by United States first class mail, postage prepaid.

Richard C. Moenning, 47034
135 S. LaSalle Street, Suite 3600
Chicago, Illinois 60603
312-263-0062 (voice)
312-263-0064 (facsimile)

No. 99-0232

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD C. MOENNING Complainant-Appellant, v. ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY, Respondent-Appellees.	)	Petition For Review of Order of Illinois Commerce Commission Case No. 97-0528

COMMONWEALTH EDISON COMPANY'S MOTION TO DISMISS APPEAL

Respondent Commonwealth Edison Company ("ComEd"), by its attorneys, Hopkins & Sutter, pursuant to Supreme Court Rule 361, respectfully moves the Illinois Appellate Court, First District to dismiss this appeal for lack of subject matter jurisdiction and failure to name the necessary parties. In particular, Appellant failed to perfect his appeal as required under Section 10-201 of the Public Utilities Act ("PUA"), 220 ILCS 5/10-201, failed to filed a timely petition for review under Supreme Court Rule 335, and failed to name all necessary parties as required under 83 Ill. Admin. Code 200.890(b). In support of this motion, ComEd states:

Procedural Background

1. On October 15, 1997, Mr. Richard C. Moenning ("Appellant") filed a complaint against ComEd with the Illinois Commerce Commission ("Commission"). On September 25, 1998, the Commission entered an order dismissing Appellant's complaint with prejudice for failing to state a claim. Appellant filed a petition for rehearing with the Commission which was denied on November 20, 1998.

2. On December 17, 1998, Appellant filed a notice of appeal with the Commission, failing to name the Commission as a respondent.

3. Seven days later, on December 24, 1998, Appellant filed this notice of appeal with this Court, again failing to name the Commission as a respondent. Appellant did not serve this notice of appeal on the parties until December 30, 1998.

4. Because Appellant did not file a petition for review as required under Supreme Court Rule 335, this Court did not docket the appeal based on the above referenced notice of appeal.

5. On January 20, 1998, Appellant filed a petition for review with this Court. This petition for the first time named both ComEd and the Commission as respondents.

Appellant Failed To File A Timely Notice Of Appeal With the Appellate Court

6. Section 10-201 of PUA, 220 ILCS 5/10-201, requires that any party wishing to appeal a Commission decision file a notice of appeal with the clerk of the

Commission within 35 days of the date that a copy of the order or decision sought to be reviewed was served upon the party. 220 ILCS 5/10-201(a). Section 10-201 further states, in part:

> The party serving such notice of appeal shall, within 5 days after the service of such notice upon the Commission, file a copy of the notice, with proof of service, with the clerk of the court to which such appeal is taken, *and thereupon the appellate court shall have jurisdiction over the appeal.*

220 ILCS 5/10-201(b) (emphasis added).

7. Appellant failed to file a copy of his notice of appeal within 5 days as required under Section 10-201(b) of the PUA. He filed his notice of appeal on the Commission on December 17, 1998, but did not file a copy of such notice with the appellate court until December 24, 1998, seven days later. Because he did not comply with Section 10-201 of the PUA, Appellate failed to perfect his appeal and jurisdiction was not conferred on this Court.

8. It is well-settled that a "court sitting in review of a decision of the Commission is in the exercise of a special jurisdiction, and such appeals must be prosecuted in accordance with the requirements of the Public Utilities Act to be legally effective." *Ferndale Heights Utility Co. v. Illinois Commerce Commission*, 112 Ill. App. 3d 175, 178, 445 N.E.2d 334, 337 (1st Dist. 1982).

9. Therefore, this Court does not have jurisdiction over the appeal and it should be dismissed.

Appellant Failed To File A Timely Petition For Review With the Appellate Court

10. Supreme Court Rule 335 requires that a party seeking direct review of an order of an administrative agency shall file a petition for review in the Appellate Court. Sup. Ct. R. 335(a).

11. Section 10-201 of the PUA requires that a party seeking review of a Commission decision appeal "[w]ithin 35 days from the date that a copy of the order or decision sought to be reviewed was served upon the party. . . . " 220 ILCS 5/10-201(a).

12. The Illinois Supreme Court has held that the period within which to file a petition for review with the Appellate Court for direct review of administrative decisions is the deadline set forth for the filing of the notice of appeal. *County of Cook, Cermak Health Services v. Illinois State Local Labor Relations Board*, 144 Ill.2d 326, 331, 579 N.E.2d 866, 869 (1991) (dismissed appeal where petition for review was filed 32 days after entry of final judgment, rather than within the 30-day deadline set forth in Supreme Court Rule 303).

13. Appellant did not file a petition for review within either the 30-day timeframe set forth in Supreme Court Rule 303, Sup. Ct. R. 303(a), or the 35-day time frame specified in Section 10-201 of the PUA, 220 ILCS 5/10-201(a). He did not file a petition for review until January 20, 1999, 61 days after the final decision was issued by the Commission.

14. Appellant has failed to demonstrate a reasonable excuse for failing to file a petition for review on

time. Appellant's stated reason for failing to file a petition for review is essentially that he neglected to look at the Supreme Court Rules. (Appellant's Motion for Leave to Appeal, ¶ 7).

15. Therefore, this Court does not have jurisdiction over the appeal and it should be dismissed.

Appellant Failed To Name A Necessary Party In His Notice of Appeal

16. In his notice of appeal filed with both the Commission and the Appellate Court, Appellant failed to name the Commission as a respondent as required by the Commission's Rules of Practice.

17. Section 200.890(b) of the Commission's Rules of Practice clearly provides:

> Notice of appeals under Section 10-201 of the Public Utilities Act [220 ILCS 5/10-201] shall be served on all other parties of record. The notice of appeal filed with the Commission shall be captioned "(The name of appellant) v. Illinois Commerce Commission." In the body of the notice the appellant shall state the name and number of the Commission Docket, the order or orders appealed, but shall otherwise follow the form established by the Supreme Court Rules.

83 Ill. Admin. Code 200.890(b).

18. In the notice of appeal filed with the Commission and with the Appellate Court, Appellant failed to name the Commission as a respondent as required by Section 200.890(b) of the Commission's Rules of Practice.

19. Appellant has failed to name the Commission as a respondent in previous appeals involving these same parties and is on notice of his obligation to do so. In *Moenning v. Commonwealth Edison Company*, 134 Ill. App. 3d 468, 481 N.E.2d 36 (1st Dist. 1985), Appellant similarly failed to name the Commission as a necessary party and this issue was thoroughly litigated. Because there was no Commission rule or statute, at that time, requiring the Commission be named as a respondent in the caption of a notice an appeal, the court allowed Appellant to amend the notice of appeal and remanded the cause for further proceedings. *Moenning*, 134 Ill. App. 3d at 470, 481 N.E.2d at 39. However, the Commission's Rules of Practice have since been amended to expressly require that the Commission be named in the captioning of a notice of appeal. 83 Ill. Admin. Code, 200.890(b).

20. The Illinois Supreme Court has held that where the procedural requirements for judicial review of an administrative decision require that the agency be named as a party, failure to name the agency within the statutory time limit for filing the notice of appeal bars the action for administrate review. *Lockett v. Chicago Police Board*, 133 Ill.2d 349, 356, 549 N.E.2d 1266, 1269 (1990) (dismissed appeal where litigant failed to name superintendent of the Chicago police board as a defendant within 35 days of the decision being appealed as required under the Administrative Review Law). *See also Hanke v. Department of Professional Regulation*, 296 Ill. App. 3d 825, 696 N.E.2d 12 (1st Dist. 1998).

21. Furthermore, Appellant is an attorney certified to practice law in the State of Illinois. He is not a pro se

complainant and has no excuse for failing to follow the procedural rules of this Court and of the Commission.

WHEREFORE, because Appellant failed to perfect his appeal under 220 ILCS 5/10-201(b), failed to file a timely petition for review as required under Supreme Court Rule 335, and failed to name the Commission as a necessary party as required by 83 Ill. Admin. Code 200.890(b), Commonwealth Edison Company moves the Appellate Court, First District to dismiss this appeal.

Respectfully,

/s/ Karen Kremer Mahoney
Attorney for Commonwealth Edison Company

Dated: March 8, 1999

Paul F. Hanzlik
E. Glenn Rippie
Karen Kremer Mahoney
HOPKINS & SUTTER
Three First National Plaza – Suite 4100
Chicago, Illinois 60602
Telephone 312-558-6600
Facsimile 312-558-3315

Supreme Court, U.S.
FILED
MAR 2 4 2000
CLERK

(3)

No. 99-1343

In The

Supreme Court of the United States

RICHARD C. MOENNING,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF THE ILLINOIS COMMERCE COMMISSION

JOHN P. KELLIHER
Counsel of Record
THOMAS R. STANTON
Illinois Commerce Commission
Special Assistant Attorneys General
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the Illinois Commerce Commission

March 24, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28pp

QUESTION PRESENTED

Whether the Court has jurisdiction to review a decision by the Illinois Appellate Court dismissing an appeal from a state administrative agency as untimely solely on state law grounds?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

ARGUMENT 6

I. This Court Lacks Jurisdiction To Review the Judgment Because the Illinois Appellate Court Dismissed the Appeal Solely On State Law Grounds 6

II. The Commission's Rules Provide for Dismissing Complaints Without Evidentiary Hearings and the Commission Dismissed Petitioner's Complaint in Accordance with Due Process of Law 9

III. Petitioner's Failure to Perfect His Appeal Precluded Judicial Review of the Commission's Order 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 117 S. Ct. 1028 (1997) 6

Bloom Twp. High Sch. v. ICC, 722 N.E.2d 676 (Ill. App. 1st Dist. 1999) 11

Chesapeake & Ohio Ry. Co. v. McDonald, 214 U.S. 191 (1909) 8

Chesterfield-Medora v. ICC, 37 Ill.2d 324 (1968) 11

Coleman v. Thompson, 501 U.S. 722 (1991) 6

Francis v. Henderson, 425 U.S. 536 (1976) 9, 14

Harris v. Reed, 489 U.S. 255 (1989) 6

International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380 (1986) 6

John v. Paullin, 231 U.S. 583 (1913) 7, 8

Moenning v. Commonwealth Edison Company, 481 N.E.2d 36 (Ill. App. 1st Dist. 1985) 1

Moenning v. Illinois Bell Telephone Company, 487 N.E.2d 980 (Ill. App. 1st Dist. 1985) 1, 4

Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609 (1973) 9

Zinermon v. Burch, 494 U.S. 113 (1990) 12

STATUTES

28 U.S.C. § 1257 6

220 ILCS 5/10-101 (West Supp. 1999) 4, 10, 14

220 ILCS 5/10-201 (West Supp. 1999) 4, 5, 9, 13, 14

TABLE OF AUTHORITIES – Continued

Page

CODES

83 Ill. Admin. Code § 200.170(c) 3

83 Ill. Admin. Code § 200.190(a) 10

83 Ill. Admin. Code § 200.190(f) 10

83 Ill. Admin. Code § 200.890(b) 14

83 Ill. Admin. Code § 280.50 ..... 1, 3, 11

83 Ill. Admin. Code § 280.50(a) 1

83 Ill. Admin. Code § 280.60 ..... 1, 3, 11

83 Ill. Admin. Code § 280.60(c) 1

83 Ill. Admin. Code § 280.70 ..... 1, 3, 11

83 Ill. Admin. Code § 280.70(d) 2

83 Ill. Admin. Code § 280.130(a) 2

RULES

155 Ill.2d R. 335 ..... 4, 5, 9, 13, 14

AGENCY ORDERS

Moenning v. Commonwealth Edison Company, Ill. C. C. Dkt. No. 97-0528 (Sept. 23, 1998) 3

STATEMENT

On October 15, 1997, the petitioner, Richard C. Moenning ("Petitioner") filed a formal complaint with the Illinois Commerce Commission ("Commission" or "ICC"), the gist of which is that Commonwealth Edison Company ("ComEd"), a regulated Illinois public utility, required him to provide it with a customer deposit following a service discontinuance on or about June 11, 1997. The Complaint also alleged that ComEd declined to grant Petitioner access to its records related to the event in question as those records were considered by ComEd to be confidential. The Complaint also contained three counts challenging the lawfulness of Sections 280.50, 280.60 and 280.70 of 83 Illinois Administrative Code, which circumscribe utilities' common law rights to manage their credit policies through the requirement of customer deposits in certain circumstances. (ComEd App. 1). Petitioner has previously challenged the lawfulness of the Commission's security deposit rules. *Moenning v. Illinois Bell Telephone Company*, 487 N.E.2d 980 (Ill. App. 1st Dist 1985); *Moenning v. Commonwealth Edison Company*, 481 N.E.2d 36 (Ill. App. 1st Dist. 1985).

As background, the procedures governing customer eligibility for public utility service, deposits, and payment practices in Illinois are established by Commission rule. Specifically, under section 280.50, a utility may request a deposit from a residential customer who is an applicant for service in certain circumstances. 83 Ill. Admin. Code § 280.50 (ICC App. 1). Under section 280.60(e), a present customer whose service is disconnected is treated as an applicant for service subject to the deposit provisions of section 280.50(a). As a general rule,

a deposit plus interest is automatically refunded to a customer after twelve months, so long as the customer's service has not been interrupted for non-payment or so long as the customer has not established a pattern of late payments by, for example, paying late four times if billed monthly. 83 Ill. Admin. Code § 280.70(d) (ICC App. 3). Discontinuance of a customer's electric service is permitted under several circumstances, including a customer's failure to make or increase a required deposit or pay a past due bill. 83 Ill. Admin. Code § 280.130(a) (ICC App. 7). Petitioner's complaint contained no well-pled facts demonstrating the Commission's deposit rules did not apply to him.

In response to Petitioner's complaint, ComEd filed a motion to dismiss the case with prejudice. (ComEd App. 5). ComEd argued that Petitioner failed to raise any contested factual issue in his complaint, that his challenges to certain Commission regulations regulating public utility customer deposit practices had been fully litigated in previous Commission dockets by Petitioner, and that his complaint regarding ComEd's refusal to grant him access to certain customer records as confidential were without merit.

In Response to ComEd's motion, Petitioner asserted that he would seek by amended formal complaint to show that section 280 was not authorized by the Illinois Legislature to apply to residential customers, that the Illinois Public Utilities Act's ("IPUA") requirements that public utility rules and regulations be just and reasonable does not allow ComEd to claim its records of service are confidential, and that the IPUA's requirement that utility rates and charges be just and reasonable applies to

ComEd's customer deposit practices. (ComEd App. 17-18). Thus, according to Petitioner, his proposed amendments would be aimed at challenges to Commission rules and interpretations of the IPUA – legal as opposed to factual challenges.

On September 23, 1998, the Commission granted ComEd's motion to dismiss. *Moenning v. Commonwealth Edison Company*, Ill. C. C. Dkt. No. 97-0528 (Sept. 23, 1998) ("Order"). (Pet. App. 1). As the Commission's Order makes clear, the record in the case established that Petitioner's electric service was disconnected for non-payment of his bill, and that in accordance with the Commission's customer deposit rules (83 Ill. Admin. Code §§ 280.50 and 280.70) ComEd's request for a deposit was proper and conformed to the law and the Commission's rules. (Pet. App. 6). The Commission found that not only did Petitioner fail to present a cognizable complaint as required by 83 Ill. Admin. Code 200.170(c) but also that the arguments and allegations in both his response to ComEd's motion to dismiss and his brief on exceptions to the Hearing Examiner's Proposed Order "are clearly without merit and must be rejected." (Pet. App. 6-7). As the Commission noted in its Order, Petitioner's service was disconnected for non-payment of his bill, and the Commission's rules clearly allow a utility to request a deposit following disconnection of service for non-payment. (Pet. App. 6); 83. Ill. Admin. Code §§ 280.50, 280.60, 280.70.

With regard to Petitioner's challenges to the Commission's deposit rules, the Commission noted that the issue of the lawfulness of authorizing utility collection of deposits for customers with erratic payment patterns was

affirmed by the Illinois Appellate Court in *Moenning v. Illinois Bell Telephone Company*, 487 N.E.2d 980 (Ill. App. 1st Dist. 1985). Reviewing Petitioner's allegations in this case and comparing them to those raised in previous cases, the Commission concluded that the previous cases involving Petitioner involved a thorough review of the same allegations and issues challenging the regulations governing deposits presented in the current complaint. (Pet. App. 6).

Following the Commission's dismissal of his complaint, Petitioner attempted to appeal the Commission's decision to the Illinois Appellate Court, but failed to comply with the requirements of either Illinois Supreme Court Rule 335 or section 5/10-201 of the IPUA. For example, Petitioner filed a Notice of Appeal with the Commission on December 17, 1998. (ComEd App. 19). The Notice failed to name the Commission. Also, although section 5/10-201 requires a copy of the Notice of Appeal filed with the Commission to be filed with the appellate court within five days following service of the Notice upon the Commission, Petitioner's pleading with the Illinois Appellate Court indicates he filed his copy of the Notice on December 24, 1998, seven days following service on the Commission. (ComEd App. 22). That document also fails to name the Commission. In addition, Petitioner failed to follow the requirements of Illinois Supreme Court Rule 335. His Petition for Leave to Appeal was not filed with the Illinois Appellate Court until January 20, 1999. (ComEd App. 27).

Because Petitioner failed to perfect his appeal under either Rule 335 or under 220 ILCS 5/10-201 his appeal was properly dismissed based on the Appellate Court's

construction of Illinois law. (Pet. App. 13). Following the court's dismissal of his appeal, Petitioner filed a Petition for Leave to Appeal and a Motion for Supervisory Order. (Pet. 4). On June 30, 1999, the Illinois Supreme Court denied Petitioner's motion for Supervisory Order. (Pet. App. 16). On October 6, 1999 the Illinois Supreme Court denied his Petition for Leave to Appeal of Right or in the Alternative, Petition for Leave to Appeal. (Pet. App. 17). On November 16, 1999, the Illinois Supreme Court denied Petitioner's Motion for Leave to File a Motion for Reconsideration of the Order denying his Petition for Leave to Appeal. (Pet. App. 18). Following the denial of that motion, Petitioner filed his Petition for Writ of Certiorari with this Court.

Petitioner's arguments to the contrary, this case is not one which warrants further review by this Court. Instead, the record in this case indicates that Petitioner, a licensed attorney with a history of bringing actions before the Commission relating to the non-payment of his utility bills, filed a wholly inadequate complaint before the Commission. As a result, the Commission granted ComEd's Motion to Dismiss. Petitioner then failed to comply with the rules for obtaining judicial review of the Commission's Order, failing to follow the requirements either of Illinois Supreme Court Rule 335 or of section 5/10-201 of the IPUA. The Illinois Appellate Court's dismissal of Petitioner's untimely appeal does not afford this Court jurisdiction to review Petitioner's federal claims. Accordingly, his Petition for Writ of Certiorari should be denied.

ARGUMENT

I. This Court Lacks Jurisdiction To Review the Judgment Because the Illinois Appellate Court Dismissed the Appeal Solely On State Law Grounds.

It is well-settled that the Court has no authority to review state determinations of purely state law. *E.g.*, *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). Under 28 U.S.C. § 1257, the Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court is asked to review. *Adams v. Robertson*, 117 S. Ct. 1028, 1029 (1997) (per curiam). As a corollary, under the independent and adequate state grounds doctrine, this Court will not consider an issue of federal law on direct review from a judgment of a state court if the judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the state court's decision. *Harris v. Reed*, 489 U.S. 255, 260 (1989).

In this case, as Petitioner concedes, the Illinois Appellate Court did not address his federal due process claim and, as he tacitly concedes, the federal claim was not properly presented to the court because the court dismissed the appeal without reaching the merits. As a result, this Court lacks jurisdiction to review the Illinois Appellate Court's judgment dismissing Petitioner's appeal. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Further, because the requirements for application of the independent and adequate state grounds doctrine are

clearly met here, Petitioner's request for a writ of certiorari must be dismissed.

Petitioner's request must be dismissed on the authority of this Court's decision in *John v. Paullin*, 231 U.S. 583 (1913), which controls the disposition of this case. In *Paullin*, the Court was asked to review a decision of the Oklahoma Supreme Court dismissing an appeal on the ground that certain parties whose presence was essential to the appeal were not brought into the proceeding as required by Oklahoma law. *Paullin*, 231 U.S. at 585. Respondents challenged the jurisdiction of the Court to hear the case. In dismissing the writ of error for want of jurisdiction, the Court held that the state court's "judgment of dismissal turned entirely upon a question of local law" and, therefore, the Court lacked jurisdiction to review the judgment. *Id.* at 586-87. The Court observed:

> As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. Certainly no federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> * * * *

> Thus it appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the constitution and laws of the State. In short, the judgment of dismissal turned entirely upon a question of local law.

Id. at 585-86 (citation omitted). *See Chesapeake & Ohio Ry. Co. v. McDonald*, 214 U.S. 191, 195 (1909) (dismissing a petition for writ of error because petitioner failed to seek review of the state court judgment within the time prescribed by the state statute for review of such orders).

In this case, Petitioner failed to comply with the rules for appealing a Commission order, the Illinois Appellate Court dismissed his appeal on that basis, and on the authority of *Paullin* and *Chesapeake*, among other cases, this Court lacks jurisdiction to review that judgment resting exclusively on Illinois law. The Illinois Appellate Court relied on the State's procedural rules as an independent basis, indeed the sole basis, for its disposition of Petitioner's appeal. In the Illinois Appellate Court, Respondent ComEd moved to dismiss Petitioner's appeal on three procedural grounds: i) failure to file a timely notice of appeal with the Appellate Court; ii) failure to file a timely petition for review with the Appellate Court; and iii) failure to name a necessary party in the notice of appeal. (ComEd App. 30-36; Pet. 3). The court granted ComEd's motion and dismissed the appeal. As a consequence, the parties did not brief the merits and the court did not decide the merits of Petitioner's appeal.

In addition, the Illinois Appellate Court's judgment rests on an adequate state law ground. This Court often has recognized the important interest in finality served by state procedural rules and observed that "it is beyond question that under the Due Process Clause of the Fourteenth Amendment [states] may attach reasonable time limitations to the assertion of federal constitutional rights. *Francis v. Henderson*, 425 U.S. 536, 541 (1976) (quoting *Michel v. Louisiana*, 350 U.S. 91, 97 (1955) (internal quotation marks omitted). In Illinois, 220 ILCS 5/10-201 and Illinois Supreme Court Rule 335 establish the procedures for appealing Commission orders. Under either rule, Petitioner's appeal was untimely and appellate jurisdiction did not attach. The Illinois Appellate Court found that Petitioner failed to comply with state law procedures to invoke appellate jurisdiction and, therefore, procedurally defaulted his right to appeal the Commission's Order. Accordingly, the Illinois Appellate Court's judgment is clearly an adequate state ground and independent of the merits of Petitioner's federal due process claim.

II. The Commission's Rules Provide for Dismissing Complaints Without Evidentiary Hearings and the Commission Dismissed Petitioner's Complaint in Accordance with Due Process of Law.

As a general principle, the Due Process Clause of the Fourteenth Amendment does not impose on state agencies a constitutional requirement to hold an evidentiary hearing upon every complaint. *E.g., Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 621 (1973). The

gravamen of Petitioner's first reason for granting certiorari is that the Commission lacks authority to dismiss formal complaints without holding an evidentiary hearing and, in doing so here, the Commission violated his right to due process. (Pet. 5, 10). Contrary to Petitioner's assertion, the Commission has the authority to dismiss complaints without holding evidentiary hearings and its exercise of that authority here did not violate any process to which Petitioner is due.

Section 5/10-101 of the IPUA provides, in relevant part: "The Commission . . . shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Act's relating to public utilities subject to such rules and regulations as the Commission may establish." 220 ILCS 5/10-101 (West Supp. 1999) (ICC App. 6). Section 5/10-101 further provides: "[T]he Commission may adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to govern its proceedings, and regulate the mode and manner of all investigations and hearings, and alter and amend the same." In accordance with this grant of authority, the Commission adopted rules to govern its proceedings.

The Commission's Rules of Practice provide for dismissal of proceedings without holding evidentiary hearings. Section 200.190(a) of the Rules specifically provides: "Motions may be presented requesting . . . the dismissal of the proceeding for want of jurisdiction, or want of prosecution . . . *or such relief or order as may be appropriate.*") (emphasis added). 83 Ill. Admin. Code Section 200.190(a); *see id.* § 200.190(f) ("When the Commission grants a contested motion to dismiss a proceeding, in

whole or part, the Commission shall issue an order presenting its rationale for the grant."). (ICC App. 5). In addition, Illinois courts have confirmed that the Commission may dispose of complaints without evidentiary hearings. *See, e.g., Chesterfield-Medora v. ICC*, 37 Ill.2d 324, 328 (1968) ("To hold that evidentiary hearings are necessary upon the filing of every complaint and that any company made a party, even though wrongfully, must respond and defend is compelled by neither the statute nor common sense."). *See also Bloom Twp. High Sch. v. ICC*, 722 N.E.2d 676, 687 (Ill. App. 1st Dist. 1999) (assuming Commission had authority to grant summary disposition of complaints). Unsurprisingly, Petitioner points to no statutory provision requiring the Commission to hold an evidentiary hearing upon the filing of every complaint.

In exercising its authority, the Commission correctly dismissed Petitioner's complaint in accordance with due process of law. In his complaint before the Commission, Petitioner challenged the lawfulness of the Commission's deposit rules and ComEd's actions in not providing him with certain information relating to discontinuance of his electric service. (ComEd App. 1-4). In relief, he asked the Commission to declare that ComEd's customer records are not "confidential" and must be disclosed to customers, to enjoin enforcement of Commission rules 280.50, 280.60, and 280.70, and to require ComEd to furnish reasonable, just and nondiscriminatory electric service to him. (ComEd App. 4). In response, ComEd moved to dismiss Petitioner's complaint for failure to state a claim upon which relief can be granted.

The Commission found it uncontroverted that Petitioner's electric service was disconnected for nonpayment. (Pet. App. 6). The Commission also found the deposit rules to be lawful. (*Id.*). As a result, the Commission determined ComEd's request for Petitioner to pay a deposit to have his service reconnected to be lawful and in accordance with the Commission's rules and regulations. (*Id.*). Further, the Commission found no outstanding issues of fact or law. (*Id.* at 6-7).

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Assuming Petitioner has a constitutionally protected interest that the Commission deprived, that interest was deprived with due process of law. At the Commission, Petitioner filed, among other things, a brief in opposition to ComEd's motion to dismiss, filed exceptions to the hearing examiner's proposed order, and filed an application for rehearing of the Commission's decision. The Commission considered all of Petitioner's arguments and found them to be without merit. Furthermore, Petitioner availed himself of the opportunity to appeal the Commission's order to the Illinois Appellate Court, but failed to perfect his appeal and, hence, the appeal was dismissed. (Pet. App. 13). Thus, in the proceedings before the Commission, and in the appellate court, Petitioner received all the process he was due.

III. Petitioner's Failure to Perfect His Appeal Precluded Judicial Review of the Commission's Order.

Regarding Petitioner's second reason for granting a writ of certiorari, he appears to argue that he has an absolute right to judicial review of the Commission's order notwithstanding his failure to follow the procedures established to obtain such review. (Pet. 7-9). The gist of his argument, as best as we can discern it, seems to be that his failure to follow 220 ILCS 5/10-201, the statute prescribing judicial review of Commission orders, is not fatal, but that his untimeliness can be excused by Illinois Supreme Court Rule 335, which prescribes the procedures for direct review of orders of administrative agencies, and the court's dismissal of his appeal constituted a denial of due process. In other words, Petitioner argues that he can follow either rule – at his option – and the court must hear his appeal. Petitioner's argument, however, is not only wrong but also irrelevant because Petitioner failed to perfect his appeal under either 5/10-201 or Rule 335. Accordingly, Respondent ComEd moved to dismiss his appeal in the appellate court and the court granted the motion.

More basic, Petitioner fails to establish a federal issue. Whether Petitioner complied with the requirements for obtaining review of the Commission's order is a question of purely state law. "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal Rights are in controversy than

when the case turns entirely upon questions of local or general law." *Paullin*, 231 U.S. at 585. And, as *Francis* informs, under the due process clause, states "may attach reasonable time limitations to the assertion of federal constitutional rights." *Francis*, 425 U.S. at 541 (internal quotation marks omitted). Petitioner does not challenge the reasonableness of the requirements for obtaining judicial review of Commission orders. Nor does Petitioner claim that the Illinois Appellate Court's dismissal of his appeal denied him due process. Rather, the nub of his claim is that the court simply erred in dismissing his appeal. But an error of state law, as alleged here, does not amount to a constitutional violation of due process.

To the extent Petitioner contends that the Commission itself somehow infringed his right to appeal ("the case presents the perplexing question whether the agency itself ought to control the process of judicial review" (Pet. 7)), this contention, like the previous one, does not raise a federal issue and, in any event, is plainly without merit. The Illinois legislature established in section 5/10-201 of the IPUA the procedures for obtaining review of Commission orders. Pursuant to section 5/10-101 of the IPUA, the Commission adopted a rule requiring appellants to name the Commission in their notices of appeal.[1] 83 Ill. Admin. Code Section 200.890(b). (ICC App. 7). Petitioner fails to explain how the Commission's rule is unreasonable or otherwise deprives him of due process of law in

---

[1] Section 200.890(b) is similar to Illinois Supreme Court Rule 335, which requires that the agency be named as Respondent in the petition for review. *See* 155 Ill.2d R. 335.

violation of the Fourteenth Amendment. Petitioner simply failed to comply with the rule requiring him to name the Commission in his notice of appeal. In response, ComEd moved to dismiss Petitioner's appeal, noting the failure to name the Commission as one of three reasons for dismissal. Thus, Petitioner has supplied no whisper of support for the contention that the Commission somehow denied him his opportunity for judicial review.

CONCLUSION

The petition for a writ of certiorari should be dismissed or, in the alternative, denied.

Respectfully submitted,

JOHN P. KELLIHER*
THOMAS R. STANTON
Illinois Commerce Commission
Special Assistant Attorneys General
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the Illinois Commerce Commission

Counsel of Record

March 24, 2000

Section 280.50 Applicants for Service

a) If, after a review of its own past service records, a utility finds that an applicant for residential services has failed to pay for past due utility service for the same class of service furnished to him/her at the same or at another address, a utility may refuse to provide service, unless the applicant, at the option of the utility, pays any past due bill and/or provides a deposit pursuant to Section 280.70 and/or enters into a deferred payment agreement pursuant to Section 280.110. For purposes of this subsection, a utility may refuse to provide service if the applicant is liable for a past due bill for utility service pursuant to Section 15 of the rights of Married Persons Act [750 ILCS 65/15], unless the applicant, at the option of the utility, pays any past due bill and/or provides a deposit pursuant to Section 280.70 and/or enters into a deferred payment agreement pursuant to Section 280.110.

* * * *

Section 280.60 Present Customers

* * * *

e) A present customer whose service is discontinued becomes an applicant for service subject to the provisions of Section 280.50 herein for purposes of reconnection of his/her service.

* * * *

Section 280.70 Deposits

a) Applicants for Service – Conditions under which a utility may request a deposit from applicants for service are set out in Section 280.50 herein.

b) Present Customers – Conditions under which a utility may request a deposit from present customers are set out in Section 280.60 herein.

c) Amount

1) Deposits required of applicants for residential service, residential customers, applicants for non-residential service which are not "small businesses" (see Section 280.40), and non-residential customers which are not small businesses, shall be governed by the following:

A) In the case of gas utilities and electric utilities, no utility shall request a deposit from an applicant for residential service or from an applicant for residential service or from a residential customer IN EXCESS OF 1/6 OF THE ESTIMATED ANNUAL CHARGES FOR SERVICE FOR THE APPLICANT OR CUSTOMER COMPUTED AT THE NET RATE FOR THAT CLASS OF SERVICE. (Section 3 of P.A. 83-1343). In the case of gas utilities and electric utilities, no utility shall request a deposit from an applicant for non-residential service or from a non-residential customer in excess of 1/3 of the amount of the estimated annual charges for service for the applicant or customer computed at the net rate for that class of service. In the case of water utilities and sanitary sewer

utilities, no utility shall request a deposit from an applicant or customer in excess of 1/3 of the estimated annual charges for service computed at the net rate for that class of service.

B) A UTILITY MAY REQUEST THAT A MINIMUM OF 1/3 OF THE AMOUNT OF A REQUESTED DEPOSIT BE PAID WITHIN TWELVE DAYS AFTER THE ISSUE DATE OF THE REQUEST FOR DEPOSIT. At least two billing periods shall be allowed by gas utilities and electric utilities in which to pay the balance of the deposit. A period of thirty days shall be allowed by water utilities and sanitary sewer utilities in which to pay the balance of the deposit.

* * * *

d) Refund of Deposits

1) Deposits plus interest shall be automatically refunded after being held for twelve months as follows:

A) if the twelve months during which the deposit was held are within the first twenty-four months that a customer has received utility service, the deposit plus interest shall be refunded only so long as the service has not been interrupted for nonpayment or so long as the customer has not paid late four times if billed monthly, two consecutive times or three times if billed bi-monthly or two times if billed quarterly or semi-annually or so long as the customer's wires,

pipes, meters or other service equipment have not been tampered with during the time the deposit was held which resulted in the customer enjoying the benefit of the tampering.

B) if the twelve months during which the deposit was held were subsequent to the first twenty-four months that a customer has received utility service, the deposit plus interest shall be refunded only so long as the service has not been interrupted for nonpayment or so long as the customer has not paid late six times during the past twelve months if billed monthly, or three times if billed bimonthly or two times if billed quarterly or semi-annually or so long as the customer's wires, pipes, meters or other service equipment have not been tampered with during the time the deposit was held which resulted in the customer enjoying the benefit of the tampering.

C) deposits plus interest need not be refunded until the customer pays any past due bills for utility service.

2) Deposits plus interest shall be refunded upon the discontinuance of service for more than thirty days less the amount of unpaid bills, if any, for the service. A transfer of service from one premise to another within the area served by the utility need not be deemed a discontinuance of service by the utility if the character of service remains the same. When a deposit plus interest is applied to the liquidation of unpaid bills, the utility shall provide the customer with a

statement. (Cancellation Notice) showing the amount of the deposit, the amount of any accrued interest, the amount of the unpaid bill(s) liquidated by the deposit plus interest and the balance remaining due either to the customer or to the utility.

* * * *

4) At the option of the utility, a deposit plus interest may be refunded, in whole or in part, at any time earlier than the times hereinbefore prescribed.

Section 200.190 Motions

a) Motions may be presented requesting a more sufficient pleading, a bill of particulars, the striking of irrelevant, immaterial, scurrilous or unethical matter, the addition of necessary parties, the dismissal of the proceeding for want of jurisdiction or want of prosecution, the quashing of a subpoena, the postponement of an effective date of an order, the extension of time for compliance with an order or such other relief or order as may be appropriate.

b) Motions may be presented requesting the Hearing Examiner's direction concerning prehearing submissions and procedures as provided in Section 200.310 of this Part.

c) Motions, unless made during a hearing, shall be made in writing, shall set forth the relief or order sought and shall be filed and served as provided in Section 200.150(b), (c), and (d) of this Part.

Motions based on matter which does not appear of record shall be supported by affidavit.

d) Relief pending disposition of a proceeding, including interim relief, may be requested by motion.

e) Unless otherwise specified by the Hearing Examiner, responses to motions shall be filed and served within 14 days after service of the motion and replies to responses shall be filed and served within 7 days after service of the responses.

f) When the Commission grants a contested motion to dismiss a proceeding, in whole or in part, the Commission shall issue an order presenting its rationale for the grant.

5/10-101. Investigations and hearings

§ 10-101. The Commission, or any commissioner or hearing examiner designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish.

* * * *

To the extent consistent with this Section and the Illinois Administrative Procedure Act, the Commission may adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to

govern its proceedings, and regulate the mode and manner of all investigations and hearings, and alter and amend the same.

Section 200.890 Appeals

* * * *

b) Notice of appeals under Section 10-201 of the Public Utilities Act [220 ILCS 5/10-201] shall be served on all other parties of record. The notice of appeal filed with the Commission shall be captioned "(The name of appellant) v. Illinois Commerce Commission." In the body of the notice the appellant shall state the name and number of the Commission Docket, the order or orders appealed, but shall otherwise follow the form established by the Supreme Court Rules.

* * * *

Section 280.130 Discontinuance of Service

1) Discontinuance

A utility may discontinue service when any customer fails to do any of the following:

A) make a deposit or increase a deposit pursuant to Section 280.70 herein;

B) pay a past due bill owed to the utility for the same class of service furnished at the same or at another location . . . ;

C) comply with an order of the Commission;

D) make payment in accordance with the terms of a deferred payment agreement;

E) comply with any rules of the utility on file with the Commission for which the utility is authorized by tariff to discontinue service for noncompliance on the part of the customer or user; or

F) provide utility representatives with access to the meter after receiving consecutively estimated bills for four billing periods if billed monthly or bi-monthly or two billing periods if billed quarterly or semi-annually and the utility thereafter makes a written request for access.

* * *

(4)

No. 99-1343

Supreme Court, U.S.
FILED
APR 5
CLERK

In The

Supreme Court of the United States

RICHARD C. MOENNING,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONER'S REPLY MEMORANDUM

RICHARD C. MOENNING, pro se
Counsel of Record
OFFICES OF RICHARD C. MOENNING – LAWYER
135 S. LaSalle Street
Chicago, Illinois 60603
312-263-0062

6 pp

PETITIONER'S REPLY MEMORANDUM

Each respondent claims the Supreme Court ought to deny petitioner the fundamental fairness provided by Illinois statute and guaranteed by the Equal Protection Clause of the Fourteenth Amendment. (The Public Utility Act, 220 ILCS 5/10-101, incorporating The Illinois Administrative Procedure Act, 5 ILCS 100/1-1 and in particular the requirement of a "contested case"). Two reasons are advanced by each that upon scrutiny demonstrate respondents' proclivity toward " . . . intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." The Equal Protection clause of the Fourteenth Amendment stands to secure fundamental fairness for every person.[1]

A. Respondent Commonwealth Edison's Opposition To Certiorari

Respondent Commonwealth Edison's principal claim is that there is an independent and adequate state law basis that bars this Court from entering an appropriate order (28 U.S.C. § 2106) that petitioner seeks. (Pet. 9-10). The state law basis alleged is the Illinois Appellate Court's order dismissing petitioner's appeal after it previously and expressly authorized the appeal to proceed. (Pet. App. 12).

Adams v. Robertson, 520 U.S. 83 (1997) cited by respondent Commonwealth Edison when applied to the facts here provides no reason not to grant certiorari, vacate, and

---

[1] Fundamental fairness protects even petitioner who as a lawyer is better able than most consumers to challenge respondent Commonwealth Edison's irrational and wholly arbitrary behavior for the good of all other consumers. Likewise, the public's interest in due process is surely greater than the interest of respondent Illinois Commerce Commission to argue claims not in the record it failed to make of evidence it refused to hear. See *Village of Willowbrook v. Olech*, U.S. Supreme Court Docket No. 98-1288, February 23, 2000.

remand as petitioner requests. (Pet. 11). Petitioner not only met his burden of showing the due process issue was properly presented to respondent Illinois Commerce Commission (the decision the Court is asked to review) the record demonstrates petitioner repeatedly sought any reason for Appellate Court changing its position after authorizing the appeal. (Pet. App. 15-18). Petitioner has satisfied the Adams' requirement, (*Adams*, at pp. 86-87).

Also respondent Commonwealth Edison claims petitioner did not properly perfect his appeal so there is no final judgment that could be the basis for this Court's 28 U.S.C. § 1257 jurisdiction. Respondent Commonwealth Edison's argument is plainly wrong since the record shows petitioner's Motion For Leave To Appeal was expressly authorized *as timely*. (Pet. App. 12). In the event respondent Commonwealth Edison continues to assert the Appeal was not timely, the computation follows: 35 days from Nov. 20 is Dec. 25 (26) and 30 days from Dec. 26 is Jan. 25; the Motion was filed Jan. 20, 1999.

A GVR order is appropriate since this Court cannot be certain given the Appellate Court's express authorization of petitioner's appeal (Pet. App. 12) why respondent Commonwealth Edison relies upon a notice of appeal (Resp. App. 20, 24) that the appellate court clerk did not docket even after the Notice of Appeal was filed. *Id.* Regardless, petitioner did timely perfect an appeal. (Resp. App. 26). Respondent Commonwealth Edison's argument relying upon a Notice of Appeal that was never docketed and on which the Appellate Court did not rely when it expressly authorized the appeal to proceed is disingenuous, and is not persuasive.

Respondent Commonwealth Edison advances a third reason in opposition. The reason is there is no denial of due process by respondent Illinois Commerce Commission since there are no issues discussed by petitioner to suggest any violation of due process or that substantial due process issues exist that warrant review by this Court. Petitioner cites the want of hearing and the respondent Illinois Commerce Commission's arbitrary and capricious action

beyond its grant of legislative authority as violations of petitioner's right to constitutional due process. (Pet. App. 8.)[2]

Respondent Commonwealth Edison's citation of *Puerto Rico Aqueduct & Sewer Authority v. United States Environmental Protection Agency* (Brief 13-14) is misplaced. Congress gave the EPA power of summary disposition; the Illinois legislature never authorized the Illinois Commerce Commission such power.

In reply, it is well settled petitioner has the right to invoke this Court's jurisdiction where no judicial review of administrative action can be obtained. (Pet. 4-6).

B. Respondent Illinois Commerce Commission's Opposition

Respondent Illinois Commerce Commission's opposition seeks to deflect attention from question presented by petitioner to whether this Court has jurisdiction to review the decision of the Illinois Appellate Court dismissing petitioner's appeal " . . . as untimely. . . . " This claim complements the opposition of respondent Illinois Commerce Commission's regulated private utility.

As noted above, the Illinois Appellate Court never dismissed petitioner's appeal as untimely; it expressly authorized petitioner's appeal *as timely*. For what reason or reasons not disclosed by this record, the Appellate Court changed its position on respondent Commonwealth Edison's Motion To Dismiss Appeal (Respondent Commonwealth Edison, App. 30), denying petitioner's constitutional right to judicial review. The Illinois Commerce

---

[2] Respondent Commonwealth Edison's reliance upon earlier disputes with petitioner outside the record and respondent Illinois Commerce Commission's reliance upon matters outside the record to summarily dispose of the case without a hearing where no summary authority exists demonstrates "intentional and arbitrary discrimination", a plain violation of the Fourteenth Amendment. *Id.*

Commission argues in opposition petitioner's Motion For Leave to Appeal was untimely. (Resp. 9). The Illinois Appellate Court never made that finding and never vacated its order that expressly authorized the appeal. (Pet. App. 12). It is the uncertainty of the basis of the Appellate Court's dismissal that renders a GVR order appropriate as petitioner requests. (Pet. 10-11). *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed. 2d 545 (1996).

Respondent Illinois Commerce Commission opposes the grant of certiorari in this case claiming the Fourteenth Amendment does not impose a constitutional requirement to hold an evidentiary hearing upon every complaint. Nonetheless, the Illinois Public Utility Act, 220 ILCS 5/10-101 incorporating the Illinois Procedure Act requires such hearings. The statute calls for evidentiary hearings and allows the Commission to adopt reasonable and proper rules and regulations *relative to the exercise of its powers.* There is no power given the commission such as Congress has given the FDA (*Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609 (1973) or the EPA (*Puerto Rico Aqueduct & Sewer Authority v. United States Environmental Protection Agency*, 35 F.3d 600 (1st Cir. 1994), *cert. den.*, 513 U.S. 1148, 115 S.Ct. 1096 (1995). Citation of *Chesterfield-Medora v. ICC*, 37 Ill. 2d 324, 328 (1968) likewise grants no summary administrative authority. There the Illinois Supreme Court noted a hearing was not required where personal jurisdiction was lacking. Nowhere has the Illinois legislature ever granted the Illinois Commerce Commission power to act as a court of law. (Pet. 5). Finally, the respondent's citation of *Bloom Twp. High Sch. v. ICC*, 722 N.E.2d 676, 687 (Ill. App. 1st Dist 1999) (Resp. 11) is noteworthy for its parenthetical (assuming Commission had authority to grant summary disposition of complaints.) The Commission's argument in opposition is just that; an assumption of authority that the legislature has never granted. For this reason, as well, citation of its Rules (Resp. 10) calls attention to the fact there is no specific grant of summary administrative authority which must precede the making of rules.

In reply, respondent Illinois Commerce Commission's opposition depends upon the fact the Illinois legislature has given it summary administrative authority. Yet respondent points to no legislative authority. The Illinois Supreme Court has admonished respondent stating it is different from a court and has no authority to make decisions except as authorized by legislation. (Pet. 5). Respondent's failure to point to its grant of authority demonstrates its absence and its violation of petitioner's right to due process of law. (Pet. 6).

Since respondent Commonwealth Edison fails to explain the Illinois Appellate Court's express authorization of petitioner's appeal and both respondents rely solely upon Commonwealth Edison's claim that certiorari is barred since no judicial review ought to be allowed where a petitioner fails to perfect a Notice of Appeal procedure – even though here petitioner proceeded upon a Motion For Leave to Appeal – the opposition becomes the inability of each respondent to face the issues presented by the petition; whether the Fourteenth Amendment requires state administrative agencies to exercise only the power granted by the legislature and to recognize that the summary dismissal of complaints in the absence of such power is arbitrary, capricious, and in violation of the federal constitution. Whereas here respondent Commonwealth Edison and respondent Illinois Commerce Commission consider petitioner's prior disputes outside the record as a reason to deny petitioner a hearing, such treatment ought to be considered irrational and wholly arbitrary. Summary reversal is appropriate and now in order.

Respectfully submitted,

RICHARD C. MOENNING, Pro Se
Counsel of Record
135 S. LaSalle Street
Chicago, Illinois 60603
312-263-0062